

THE  
MONTHLY LAW REPORTER.

AUGUST, 1856.

HARBOR IMPROVEMENTS — PURPRESTURE.

The right and title to the lake-shore of the great lakes is in the several States, not in the United States.

In general, breakwaters and other harbor improvements constructed by the United States, of late years, have been constructed without purchase of land and cession of jurisdiction from the several States in which the works are placed, and the land under them belongs to the respective States.

Lawful authority exists for the protection of the works thus constructed from pillage or appropriation by individuals or corporations.

Obstructions to navigation in the navigable waters of the United States, whether by States or by individuals, constitute acts of purpresture.

There is a remedy in such case by *ex officio* information in the name of the Attorney-General of the United States.

OPINION OF THE ATTORNEY-GENERAL OF THE UNITED STATES.

ATTORNEY-GENERAL'S OFFICE, }  
19th October, 1853. }

SIR:—It appears by your letter of the 21st of September last, enclosing a communication to you from Colonel Abert of the corps of Topographical Engineers, that it is proposed to take legal measures to restrain any person from placing a bridge, pile, or other obstruction, nearer than within a certain prescribed distance from the breakwater now in the

course of construction on the shore of Lake Michigan, at Waukegan, in the State of Illinois, to the end that a good ship channel may be maintained free and unobstructed under the lee of said breakwater; and my opinion is requested in the premises.

Whether the United States have any right of process in the case, and if so, what, depends in part on the question, which presents itself *in limine*,— In whom are the right and title to the lake-shore, and to the soil covered by the waters of Lake Michigan, at Waukegan, in the State of Illinois?

I conceive this point to be thoroughly settled, as well by the general theory of the Federal Government as by the adjudications of the Supreme Court, and the whole tenor of the legislation of Congress.

In the case of *Pollard's Lessee v. Hagan*, 3 Howard, 212, the Supreme Court came to the following conclusions, namely:

"First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively."

"Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States."

The doctrine of this case has been considered, and affirmed, and reaffirmed, in the subsequent cases of *Goodtitle*, on the demise of Pollard's heirs, *v. Kibbe*, (9 Howard, 477,) and of *Doe*, on the demise of executors of Kennedy, *v. Beebe and others*, (13 Howard, 25,) and must be taken to be the law of the land.

The principle extends in fact to the whole body of any navigable water in the United States, and the soil under it. Thus, in the case of *Rundle et al. v. Delaware and Raritan Canal Company*, (14 Howard, 80-90,) the court say, in regard to the river Delaware, that "Below tide-water, the river, its soil and islands formerly belonged to the crown; above tide-water, it was vested in the proprietaries of the conterminous provinces, each holding *ad filum aquæ*; since the Revolution, the States have succeeded to the public rights both of the crown and the proprietaries." Similar doctrine has been advanced by the Supreme Court in regard to the river Chattahoochee for example, (*Howard et al. v. Ingersoll*, 13 Howard, 381,) and to the Potomac, (*Georgetown v. Alexandria Canal Company*, 12 Peters,

91.) and to the river Ohio, (*Pennsylvania v. Wheeling Bridge*, 13 Howard, 519,) and to Raritan Bay, (*Martin et al. v. Waddell*, 16 Peters, 367,) and applies to all other navigable waters in the United States.

It is unnecessary here to trace the history of this doctrine as a principle of constitutional law, or to review the numerous decisions in the several States, in which it has been recognized as an element of the fundamental law of the Federal Union. (See Angell on Tide Waters, ch. 2.) I content myself with showing *in extenso* the full recognition of the doctrine by the highest judicial authority of the United States.

Observe, that in the leading case of *Pollard's Lessee v. Hagan*, affirmed and reaffirmed in the subsequent cases cited, the doctrine of the court is expressly applied to the territory ceded by Virginia to the United States, out of which the State of Illinois has been formed; and it extends therefore to the waters and to the submarine soil of Lake Michigan.

I proceed now to inquire how the question stands upon the acts of Congress pertinent to the subject.

The United States have no grant from the State of Illinois, nor any title under a grant of the State, for the submerged soil whereon the bridge piers in Lake Michigan have been erected, nor whereon to erect the contemplated breakwater in the lake.

It is impossible to admit that the United States may, by erecting bridge piers, or breakwaters, or other such like works, within the sovereignty and jurisdiction of a State, and without the consent of the State, thereby divest the right, title and jurisdiction of the State, and appropriate and transfer the right of property and the sovereignty and jurisdiction over the soil and the works to the Government of the United States, any more than an individual could, by erecting a building on the soil of another, without his consent, convert the soil and the buildings on it, into the private estate right and title of such trespasser.

Neither the power of Congress to regulate commerce, nor its power to legislate in all cases whatsoever for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, can operate to divest the States of their rights of soil and jurisdiction; the lands for all such purposes must, by the express words of the Constitution, be "purchased by the consent of the legislature of the State in which the same shall be." Thus, Castle Calhoun at the

Rip-Raps, was built on the soil of the submerged shoal ceded to the United States by the State of Virginia. And Fortress Monroe, also, is built on a place ceded by the State of Virginia. By the law of the United States, approved 20th March, 1794, (1 Stat. at Large, p. 345, ch. 9,) the President of the United States was authorized to fortify the forts and harbors therein mentioned, (to the number of twenty;) and it was made lawful for him to receive from any State a cession of the lands, or to purchase from individuals the lands on which any of the fortifications with the necessary buildings may be, or are intended to be erected. This is inconsistent with the idea that the United States can, by erecting fortifications, or ports and harbors, convert the lands whereon such needful buildings shall be erected, into the property and title of the United States, without cession or purchase from the State, or the individual therein who may be the rightful proprietor.

The first volume of Bioren & Duane's edition of the Laws of the United States contains suggestive abstracts of the various cessions by States, and conveyances by individuals, at the date of that publication, made to the United States, of lands, and lots of ground, and soil above waters, and of water-lots, flats, shoals, and rocks under water, beaches, islands, and shoals, for navy-yards, customhouses, forts, arsenals, and other public purposes.

By an act approved 23d June, 1797, (1 Stat. at Large, ch. 3, § 3,) the several States, who were found indebted to the United States, on the settlements made between the United States and the several States, by the commissioners for that purpose appointed, were authorized to expend "the sums respectively due from them in fortifying their ports and harbors, and the sums so expended shall be passed to the credit of said States . . . Provided said States shall and do cede to the United States the lands or places on which such fortifications shall be so erected, in cases where the lands are the property of such States." This proviso was repealed by act of 3d May, 1798, (1 Stat. at Large, pp. 354, 355, ch. 38, § 3.) These respective acts acknowledge that the ports and harbors in the United States belong to the States respectively, within whose territorial limits and jurisdiction they are situated.

By the 7th section of an act, approved 1 May, 1820, (3 Stat. at Large, p. 568, ch. 62,) it is enacted, that "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

The joint resolution of 11th September, 1841, (5 Stat. at Large, p. 468, Resolution No. 6,) provides, that "No public money shall be expended upon any site of land hereafter to be purchased by the United States for the purposes aforesaid" (viz.: for "armories, arsenals, forts, fortifications, navy-yards, customhouses, lighthouses, or other public buildings of any kind whatever,") "until the written opinion of the Attorney-General shall be had in favor of the validity of the title, and also the consent of the legislature of the State, in which the land or site may be, shall be given to said purchase."

These acts negative any idea that Congress claims power to take to the Government of the United States dry lands, or soil covered by water, for the purposes of commerce or navigation, or naval or military purposes, or for construction of any kind of public buildings, or public improvements, without a cession from the State, or a purchase from an individual who may have title to the property desired for the site of public works intended by the United States.

Multifarious appropriations have been made for erecting breakwaters, piers, and so forth, for improvement of harbors and safety of navigation. But when so erected, Congress has not claimed any right of municipal government over them, has passed no law to punish any disturber of such public works so erected within the territorial limits and unyielded jurisdiction of any State, and has apparently left all such works to the protection of such several and respective States.

All the acts of Congress before cited seem to be in perfect accordance with the principles adjudged by the Supreme Court of the United States.

As to the application of the rule to the State of Illinois: By the 9th section of the act of 18th May, 1796, "providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky River," (1 Stat. at Large, p. 468, ch. 29,) it is enacted, "That all navigable rivers within the territory to be disposed of by this act, shall be deemed to be, and remain public highways: and in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both."

In the act of June 1st, 1796, (1 Stat. at Large, p. 491, ch. 46, § 6,) there is the same provision: and by the act

approved 26th March, 1804, entitled, "An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," (2 Stat. at Large, p. 279 and 280, § 5-6,) the lands in Indiana were by section 5th ordered to be sold, "on the same terms and conditions as are or may be provided by law for the sale of the lands of the United States north of the Ohio River and above the mouth of the Kentucky River." Section 6th: "That all the navigable rivers, creeks, and waters within the Indiana territory shall be deemed to be and remain public highways."

By act of 3d February, 1809, (2 Stat. at Large, p. 514, ch. 13,) the Territory of Indiana was divided into two separate governments, and the territory lying west of the Wabash River and a direct line therefrom, and from Vincennes, a military post at that time, due north to the territorial line between the United States and Canada, was called Illinois. The lands within this territory, however, were sold out under the statutes before mentioned, without changing the conditions, "that all the navigable rivers, creeks, and waters within the Territory should be and remain public highways," so that no individual could acquire a private right in any of them either at the public or at the private sales. Therefore, when the State of Illinois was admitted into the Union, "the shores of the navigable waters and the soils under them," within the State, became of the property, domain and jurisdiction of that State; according to the decisions before cited.

The United States have no cession from Illinois of those navigable waters, nor of the soils under them, nor of the water of Lake Michigan, nor the soil under it, within the State of Illinois, upon which the bridge piers are built, nor of the submerged soil upon which the breakwater is to be erected at Waukegan.

The conclusion is irresistible that the rights of the United States, in the premises, and the remedy, if any, for the contemplated obstructions of the navigability of the waters of Lake Michigan at Waukegan, must be placed on some ground independent of that of title to soil, or of jurisdiction and domain, which certainly continue in the State of Illinois.

It is not to be doubted, therefore, that the State of Illinois, having the property in the shore and soil covered by the water of the lake, may, at her pleasure, abate any nuisance created on said shore or soil within her jurisdiction. It would be a purpresture, an encroachment on, or

usurpation of, her sovereign rights, which she may render punishable by indictment, or may remove or reseize to the public use, in the discretion of her legislature, and of her supreme will as a State. (2 Coke's Inst. p. 38, ch. 23; and p. 272, ch. 4; 1 Hawkins, P. C., p. 360; Angell on Tide Water, ch. 7; Woolrych on Waters, p. 196.)

But suppose the State refuses or neglects to demolish a structure erected, or to prevent one about to be erected, or should license the erection of a structure, in the navigable waters of the lake within her territorial limits, by which erection a purpresture shall exist, that is, the making of that several and private, which ought of right to be common to many, and the navigation shall thus be hindered, vessels endangered, and a channel or harbor made liable to damage by obstruction or deviation of currents and accumulation of mud: — Is there not a remedy?

I think there is, and a sufficient one, in the conservative power of the United States.

The navigable waters within the State of Illinois, (or within any other State,) are public highways, free and common, by constitutional right, to the use of all the citizens of the several States, equally and fully as to the use of the State of Illinois, and to be guarded and protected as such by the Government of the United States for the benefit of the whole Union.

This power of conservation is perfectly distinct from the right of property and of ordinary jurisdiction in the shores of navigable waters and the soil under such waters. The sovereign may grant to individuals the right of property in the soil between high and low water mark, or below the latter; notwithstanding which *jus privatum* so granted by the sovereign, there will remain a *jus publicum* of passage and repassage, with consequent power of conservation in the sovereign.

"When," says Sir Matthew Hale, "a port is fixed through the soil and franchise or dominion thereof, *primâ facie*, may be in the king or by derivation in a subject, yet that *jus privatum* is burdened and superinduced with a *jus publicum* wherein nations and foreigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse. They ought to be preserved from impediments and nuisances, which may hinder and annoy the access, or abode, or recess of ships and vessels and seamen, or the unlading or relading of goods." (De Port. Maris, pt. 2, ch. 17.)

Here we see distinctly the right of conservation sepa-

rated from property in the soil, and also from the franchise and dominion thereof; and a grant of the latter does not authorize the erection of that, whereby the grantee shall make several to himself what ought of right to be common to all the inhabitants of the country, and to foreigners in amity with it. (Com. Dig. Prerog. D. 7.) That is to say, there is a right independent of the *jus privatum* in the soil or dominion, namely, the right of passage, which is not subject to alienation, and prevails against any adverse claim, (Hale, de jure Maris, 12;) in view of which we may further distinguish, and say that usurpation of the *jus privatum* of the sovereign in ports or navigable waters is purpresture, while invasion of the *jus publicum* of navigation is a nuisance. (Glanville, Bk. 9, c. 11; Spelm. Gloss. Purpresture.)

This doctrine is further explained in the legal authorities as follows :

“The right in ports is threefold: — The *jus privatum*, or the interest of property or franchise; the *jus publicum*, or the common interest that all have to have resort to and from public ports, as public sea marts or markets, with their goods, wares, and merchandize; the *jus regium*, or the right of superintendency and prerogative, which the king hath for the safety of the realm or the benefit of commerce or security of his customs.” (Hale, de Port. Maris, ch. 6; Bacon's Abr. Prerog. (B.) Ports, &c.)

These doctrines of the common law are perfectly applicable in the United States, to the effect that, while, as in the present case, the soil and immediate jurisdiction, the *jus privatum* and *jus publicum*, of the harbor of Waukegan, are vested in the State of Illinois, yet the *jus regium*, or as, in the comprehensive and proper language of the civilians of Europe, it is termed, the *jus majestaticum*, the power to protect against foreign enemies or against individual usurpation, still resides in the Federal Government.

The powers delegated by the Constitution of the United States to the Government of the Union, “to regulate commerce with foreign nations and among the several States,” and “to lay and collect taxes, duties, imposts, and excises,” include the power to establish ports of entry and delivery, and, of necessary consequence, also, the power to preserve those ports from all nuisances, which may hinder or annoy the access or recess of ships and seamen to and from the same, or the unlading and relading of goods there. But it is not in the power of a single State to establish ports of entry and delivery within its navigable waters, notwith-

standing the rights of property and jurisdiction in the shores and beds of navigable waters vested in such State; that is a *jus majestaticum*, involved in the power of regulating commerce and raising revenue vested in the United States.

Such is the doctrine of the Supreme Court of the United States in the leading case of *Gibbons v. Ogden*, (9 Wheat. 1,) in which case the State of New York, undoubted proprietor of the shores and beds of the navigable waters within the State, granted to R. R. Livingston and Robert Fulton the exclusive right of navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, of which Ogden was the assignee. By a decree in chancery, at the suit of *Ogden v. Gibbons*, the validity of that exclusive right was affirmed; upon appeal to the highest court of the State of New York, the decree of the Chancellor was affirmed; upon appeal to the Supreme Court of the United States that decision was reversed. The grant of the exclusive navigation was in violation of the Constitution of the United States, in violation of the superintending and conservative power of the Government of the United States over commerce and navigation delegated by the Constitution. The Government of the United States did not claim, nor did the respondent *Gibbons* claim for the United States any property in the shores, or the soil under the navigable waters, of New York; but the conservative power of the United States over commerce and navigation was invoked. That power removed the obstructions to commerce and navigation growing out of the purpresture granted by New York, and the retaliatory acts passed by the legislatures of New Jersey and Connecticut.

All the reasoning and the final decree in this case establish the principle that the several States hold their property and dominion in the shores and beds of the navigable waters within their respective boundaries, subject to the general rights of commerce and navigation, to the rights of ingress and egress, access and recess, for the lawful purposes of commerce and navigation, which belong to all the citizens of the United States, as well as to foreigners in amity with the United States, which rights of commerce and navigation the several States cannot hinder, obstruct, or take away by legislation; for even in the case of concurrent powers, the law of a State must yield to a law of the United States.

This doctrine is reaffirmed in the case of the *United States v. Coombs*, (12 Peters, 72,) and in the still more important one of the *State of Pennsylvania v. The Wheeling Bridge*, (13 Howard, 318.)

It is further observable, in this part of the subject, that the power to regulate the use of the shores and beds of navigable waters, so that the lawful purposes of commerce and of navigation shall not be hindered, is quite distinct from the right of eminent domain. The former leaves to the proprietor the possession and general use of his property, restrained only by the maxim, "*Sic utere tuo ut alienum non lædas*;" but the latter divests the proprietary and converts the property to public domain and public use, as explained in an important case hereinafter more fully exhibited. (*Com'th v. Alger*, 7 Cush. 53.) So that, where individuals hold a fee simple in the soil to low water mark, or below where the tide ebbs and flows, or *ad medium filum aquæ* in fresh water rivers, such title is nevertheless holden in subordination to the general rights of free passage for the lawful objects of navigation and commerce.

Assuming, then, that a power exists in the Federal Government, a *jus majesticum*,—for the conservation of the public rights of navigation and commerce, we come now to the question in what way that power is to be exerted by law.

Congress, unquestionably, has the power to declare the obstruction of navigable waters an offence against the United States. This point must be taken as fixed so far as regards the opinion of the Supreme Court of the United States. (See *State of Pennsylvania v. Wheeling Bridge*, 13 Howard, 581, per C. J. Taney; also, *Wilson and others v. The Blackbird Creek, Marsh Co.*, 2 Peters, 252, per C. J. Marshall.) But Congress has not, as yet, done this; and although the position was a doubtful one at first, (see *United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge and others*, 1 Wheaton, 415,) still it must be now received as the settled doctrine, that "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court which shall have jurisdiction of the offence," before it can be the subject of indictment in the courts of the United States. And the general doctrine, as laid down in the cases above cited, has been specially applied to the present subject in a later case, where the Supreme Court say, that "An indictment at common law would not be maintained in the courts of the

United States," (for a nuisance in a navigable water,) "as no such procedure has been authorized by Congress." *State of Pennsylvania v. Wheeling Bridge*, (13 Howard, 518, 564.)

Although Congress may not yet have fully exercised this power, so as to declare what in all cases is a nuisance, yet it has in a signal case exercised that power for an opposite purpose, namely, to declare what is not a nuisance, by enacting that the bridge, the subject of litigation in the case above cited, is a "lawful structure," and that it "shall be so taken and held to be, anything or any law or laws of the United States to the contrary notwithstanding." (Act of August 31, 1852, § 6, Sess. Acts, p. 112.)

But, from the fact that nuisances to navigable waters are not indictable in the courts of the United States, does it follow that no legal means now exist, by which the Federal Government may assert its conservative power in regard to such navigable waters? It would be strange if it were so; for when we look at the vast number of appropriations made by the United States for sea-walls, breakwaters, deepening the channels of rivers and harbors, blowing out rocks, removing natural obstructions therefrom by dredges, snag-boats, or otherwise preserving the same, and the islands therein, and placing piers, buoys, and light-boats by the shoals, narrows, and difficult passages of navigable rivers and harbors, since the commencement of the Government, we shall be deeply impressed with the magnitude and importance of the public interests involved in the question of the conservation of such works against purprestures, depredations, thefts, and trespasses, converting to the ends of private gain, or destructive malice, that which is or ought to be for the common public good of every citizen of the United States. In fact, the equity powers of the Supreme Court afford the means of meeting the grievance.

Nothing is better settled in England, than the doctrine that a court of chancery has authority in that country to restrain or abate a purpresture or nuisance in a harbor or other navigable waters, on information by the attorney-General. The cases are numerous, (e. g. *Attorney-General v. Richards*, 2 Anstruther, 603; *Attorney-General v. Johnson*, 2 Wilson's Ch. Ca. 87,) in which, on proper process, a court of chancery has acted in this matter. In one of the above cases, the defendants having erected a wharf, two docks, and other buildings, between high and low water mark, in the harbor of Portsmouth, adjoining Gosport, so as to prevent vessels from mooring there, or sailing over the

spot, and also to endanger further damage to the harbor by obstructing the free current of the water to carry off the mud, a decree was entered to abate the nuisance, upon information filed by the Attorney-General on the equity side of the Court of Exchequer. In another case the Lord Chancellor, upon similar information by the Attorney-General, and a bill for perpetual injunction, restrained the defendants from choking the bed of the Thames at Milbank. (See Woolrych on Waters, p. 214; Angell on Tide-Waters, ch. 7.)

Now, in signally decisive cases, the Supreme Court of the United States has adopted the doctrine of chancery in this matter.

The city of Georgetown filed a bill in the Circuit Court of the District, praying for an injunction to prevent the Alexandria Canal Company from obstructing the navigation of the river Potomac. On appeal to the Supreme Court, it was adjudged that the injunction did not lie in this case at the prayer of these plaintiffs, and under the particular circumstances of the case, but that the question being of a nuisance by the obstruction of a navigable river in general derogation of the public rights, the true remedy was by information in the name of the Attorney-General. (*City of Georgetown v. Alexandria Canal Company*, 12 Peters, 91.)

In the case of *The State of Pennsylvania v. The Wheeling Bridge*, the nuisance complained of was the construction of a bridge over the river Ohio, by authority of the State of Virginia. A majority of the court were of opinion that the nuisance was abateable in this process, that is, at the relation of the State of Pennsylvania. Chief-Justice Taney, while dissenting from the majority, as to the question of the competency of the proceedings, admitted, in an opinion which constitutes a model of judicial reasoning, the power of the court to abate a proved nuisance of this character, upon an information in chancery in the name of the Attorney-General. (13 Howard, 518-590.)

I take it as the undeniable law of the land, therefore, that the Attorney-General of the United States has authority, when occasion requires the abatement of a public nuisance to navigable waters, to file an information therefor, and bill for injunction, in a proper court of the United States.

But this remedy, as already intimated, is not exclusive. Each State has also the power to conserve the navigable waters within its jurisdiction by suitable process known to its laws. The United States may construct works for the

improvement or security of a given harbor, or as a shelter for ships from storms or in time of war; and they may interpose for the conservation of said works, or to guard against any diminution of the existing advantages of a river, lake, or sea, by the usurpation of individuals, or even of a sovereign State of the Union. But so, also, in my judgment, may that State itself. There is nothing in the letter of the Constitution or the spirit of the Government to forbid the State of Illinois or the State of New York from improving a natural harbor within its limits, blowing away rocks which impede a channel, dredging out a river, constructing piers, docks, breakwaters, beacons, and sea-walls, or by indictment or other process protecting the rights of riparian proprietors, or of the public at large in its navigable waters. But the United States have a concurrent jurisdiction for any of these objects, and a jurisdiction which, in case of conflict, is paramount, and exhaustive of the whole subject-matter, for otherwise a given State might do that, which, while actually or in supposition beneficial to itself, would be injurious to some other State, or to the citizens of the United States in general, or to the subjects of other governments in amity with the United States.

I had special occasion to reflect on this whole question, in all its legal relations, while participating on the bench of the Supreme Court of Massachusetts, in the decision of a case, which affords an apt illustration of the power in the premises, which any one State of the Union possesses, namely, the case of *The Commonwealth v. Alger*, (*ubi supra*; also, Massachusetts Senate Documents, 1853, No. 109.) For the protection of the harbor of Boston against injury by purpresture or nuisance, the Commonwealth of Massachusetts established by law a line along the shore of said harbor, beyond which all constructions were forbidden. The defendant being a riparian proprietor, and by the ancient law of that State, owning as such in fee the flats, on which the sea ebbs and flows adjoining his upland, to a distance from the high water mark of not exceeding one hundred rods, had constructed a wharf wholly on the flats, thus owned by himself in fee, but extending thereon to a distance seaward beyond the line prescribed by the Commonwealth. For this act he was indicted, and the indictment was maintained, and the constitutionality of the prohibition affirmed by the unanimous opinion of the Supreme Court.

In this, there is nothing inconsistent with the power in

the premises, which appertains to the United States. As the property in the shores and beds of the navigable waters, within the limits of the several States, belongs to them respectively, so the rents, issues, and profits arising from wharves, docks, or other structures, erected for the facilities of navigation and commerce, belong to them, and not to the United States. Moreover, the given State itself is primarily, and to a superior degree, interested in the conservation of its navigable waters, which are among the elements of its particular prosperity and greatness. A nuisance to such waters is, therefore, generally speaking, of special injury to the particular State in which they lie. It has, therefore, its own power in the premises to vindicate its rights of property and of navigation against purpresture or nuisance. I do not speak now of the power of a State to regulate its internal commerce, as in the matter of inspection laws, health laws, roads, ferries, and the like, whether exclusively, or in concurrence with the United States. (See *Gibbons v. Ogden*, 9 Wheaton, 1; *Brown v. Maryland*, 12 Wheaton, 419; *City of New York v. Milne*, 11 Peters, 102; *Thurlow v. Com. of Massachusetts*, 5 Howard, 504; *Smith v. Turner*, 7 Howard, 283;) nor do I speak of the power of a State over a navigable river wholly within its own jurisdiction, the improvement thereof, or the privileged navigation of the same, (see *Veazie et al. v. Moore*, 14 Howard, 568;) but I refer to the external waters of a State, its lake or sea harbors, or its rivers common to it, and to other riparian States; in all which, as I conceive, a power both of improvement and of conservation resides in the particular State. But this power is in concurrence with, and in subordination to, the supreme *jus majestaticum* vested in the United States, who alone have power to prevent one State from exerting its power in this respect to the prejudice of another State.

In these relations, the powers of the States, and those of the United States, although acting on the same nuisance and at one and the same time, would be auxiliary one to the other, and if honestly and frankly exercised involving no conflict or collision of authority.

It is no objection to this view of the subject, namely, the assumed existence of distinct substantive powers in a State and in the United States, that, in the exercise of them for their respective purposes and ends, they may bear upon the same person or subject at the same time. For instance, the direct taxes imposed by a State, and those imposed by

the United States, have, at times, been simultaneously in operation as to the same tracts of land; yet no serious collision between the two authorities ensued. The constitutional doctrine,—that the concurrent powers of the State and Federal Governments must be exercised by the former in subordination to the latter,—and that, in case of collision, the authority of the United States is the superior, and supreme, is calculated to prevent any such conflict, or to provide for it when it occurs.

Nor is it an objection to the legislation of a State, that it has a tendency to aid incidentally the execution of the laws and policy of the United States. Thus, a law of the State of Pennsylvania inflicting a penalty on a militia-man called into the service of the United States for disobeying that call, has been adjudged to be valid. (*Houston v. Moore*, 5 Wheaton, 1.) So of a law of the State of Illinois for the delivering up of persons bound to labor in another State and escaping into Illinois. (*Moore v. The State of Illinois*, 14 Howard, 13.) In each of these cases the law of the State was held to be good, as auxiliary and ancillary to that of the United States. The citizens of each State owe allegiance to that State, and obedience to the powers thereof; and at the same time they owe allegiance to the United States, and obedience to the powers thereof; and of course, the same act of a citizen may be contrary to his allegiance and duty as well to his particular State as to the United States.

Upon the whole matter my opinion is, then, that in case of a nuisance erected or about to be erected in the harbor of Waukegan, in the State of Illinois, and the facts being such as to call for the intervention of the Federal Government, it would be lawful and proper, in order to abate such nuisance, or to prevent, enjoin, and inhibit the same, for the Attorney-General to file an information in chancery before the competent court of the United States.

I am, very respectfully,

Your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS, Secretary of War.

## PARLIAMENTARY LAW.

## WHAT VOTE IS NECESSARY TO PASS A BILL OVER THE PRESIDENT'S VETO?

"EVERY bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law." Constitution of the United States, art. 1, § 7.

In the Senate of the United States, on the 7th of July, 1856, on the reconsideration of a bill to remove obstructions in the mouth of the Mississippi River, which had been vetoed by the president, the question being, "Shall the bill pass, the president's objections to the contrary notwithstanding?" the vote was 31 in the affirmative, and 12 in the negative. More than two thirds of the senators present having voted for the bill, the president *pro tempore* decided that it had passed. The decision of the chair, being appealed from, on the ground that the Constitution required two thirds of the whole Senate to pass the bill over the President's veto, was affirmed by a vote of 34 to 7. The bill, having passed the House by a similar vote on the 8th of July, and been returned to the Senate, was, by that body, on the 10th, ordered to be presented by their secretary to the Secretary of State, together with certificates of the Secretary of the Senate and Clerk of the House of Representatives, "showing that the said act was passed by a vote of two thirds of both houses of Congress, after the objections of the President thereto had been received, and after the reconsideration of said act by both houses of Congress, in accordance with the Constitution."

The vote of the Senate is the first authoritative decision of so important a point of parliamentary and constitutional law, that it would require of us a more extended notice, if we entertained the least doubt of its correctness. But the collation of a few words of the Constitution makes it

almost too clear for argument. By the fifth section of the same article, "each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business." The reconsideration of a bill, after the President's veto, is certainly one branch of the business which each house is authorized by the Constitution to do. And if it were held that when a bill is returned by the President to that house in which it originated, the "two thirds of that house," required to pass it, were two thirds of the whole house, it must also be held that "that house, who shall enter the objections at large on their journal, and proceed to reconsider it," must be a full house — thus giving to any one member, who might agree with the President, the power, by absenting himself, to prevent a reconsideration.

But the decision of the Senate is not unsupported by precedent. By the fifth article of the Constitution, "the Congress, whenever *two thirds of both houses* shall deem it necessary, shall propose amendments to the Constitution." The duty here imposed upon Congress is not the mere passing of a bill through one of the constitutional stages, but the initiating of an amendment of the Constitution itself; and yet Mr. Benjamin, of Louisiana, stated in the Senate that he found, on examination, that at the first session of the first Congress, composed for the most part of persons who had been members of the convention, eleven amendments of the Constitution passed both houses of Congress, each by a vote of two thirds of the members present, and not of the whole number.

The case, therefore, seems to be so clear, both upon principle and authority, that we should not be justified in wearying our readers with a detailed statement of the very full discussion in the Senate; and only allude to it to show that the decision should have the weight of a judgment rendered after solemn argument.

We are pleased to be able to refer to the opinion of a most competent judge, in support of our views, which we had not seen when we wrote the above. Mr. Luther S. Cushing, in his elaborate treatise on the Law and Practice of Legislative Assemblies, just published, § 2387, says, that "in the Constitution of the United States," "the house being duly constituted for the transaction of business, the majority required is that of two thirds of the members present."

*District Court of the United States, Massachusetts. May Term, 1856.*

SNOW ET AL. V. CARRUTH ET AL.

*In a libel for freight the consignees may recover for damage to cargo.*

THIS was a libel wherein the libellants, owners of the ship John W. White, sought to recover of the respondents \$653.63 for freight of 200 barrels of oil and 92 tierces of lard brought from New Orleans to Boston in the summer of 1854. There were two bills of lading, in one of which the respondents were the consignees, and the other had been assigned to them; and, on the consignment, they had advanced to nearly the value of the goods. On the arrival of the vessel at Boston they received the goods, except as mentioned hereafter. The whole number of packages was delivered, but on the subsequent guaging and weighing, it was found that 1032 gallons (equal to 27 barrels) of the oil and 1905 pounds of lard had been lost by leakage.

The respondents, not controverting the delivery of the packages, alleged a non-delivery of a part of said goods, and a non-delivery of said goods in like good order and condition as when received, and also alleged that the libellants, after receiving said goods or a part of them, (but before bills of lading were signed,) permitted them to lie upon the levee in New Orleans for two days, exposed to the sun, whereby the casks were injured and a loss by leakage caused. The libellants alleged due and proper care of the goods while in their possession.

*H. A. Scudder*, for the libellants, claimed :

1st. That the consignees had not sufficient legal interest in the goods to maintain the claim for damages, if any; that the contract for carriage was with the shippers; and that until the respondents received the goods there was no contract between them and the libellants, and that the cause of action, if any, accrued before that time.

2d. That no damages could be claimed under a bill of lading for injuries happening to goods prior to the date of such bill.

3d. That if the respondents had sufficient interest to maintain an action for damages, yet it could not be set up in defence, or by way of recoupment to the claim for

freight. And to this point were cited, Abbott on Shipping, 517; *Davison v. Gwinne*, 12 East, 381; *Shields v. Davis*, 4 Camp. 119; 6 Taunton, 65.

*Thomas H. Russell*, for the respondents, cited, as to the first point, that the contract was with the assignees, Abbott on Shipping, 421. And upon the third point, Benedict's Admiralty, § 41, p. 358; Conkling's Admiralty, pp. 13, 15; Parsons on Contracts, vol. 2, p. 427; Chitty on Contracts, p. 656; *Hunt v. Otis Co.*, 4 Mete. 464; *Moulton v. Trash*, 9 Ib. 577; *Farnsworth v. Gerard*, 1 Camp. N. P. 38; *Fisher v. Samunder*, 1 Ib. 190; *Burton v. Butler*, 7 East; 1 Scammon, 463; 5 Watts, 446; 6 Ib. 435; *Wilford et ux. v. Dorr*, 3 Mason, 161, 171; *Spur et al. v. Pierson*, 1 Ib. 109; Abbott on Shipping, 778, note and cases cited; Curtis's Rights and Duties of Merchant Seamen, 305, 306.

SPRAGUE, J., in deciding the cause, overruled the first objection in point of law. As to the second point, the court held that the liability of the carrier commenced with the receipt by him of the goods. The bill of lading acknowledges that the goods have been "shipped" prior to its date; it may have been several days or weeks prior; the obligation of the carrier begins at the time of the shipment, although the document, which is taken as the evidence of the reception and contract, may be of a subsequent date.

Upon the third point his honor said: There have been several cases in this court in which this defence was set up and sustained, but in those cases the counsel for the libellant did not raise the question, whether or not such defence could be legally made. The text-books cited by the libellants seemed to be full to the point that it could not. The cases cited in the text-books, in support of this doctrine, were *Davison v. Gwinne*, 12 East, 381, and the case in 4 Campbell, also reported in 6 Taunton. These were both decisions of the common law courts, and the earliest, that in 12 East, was not a case which decided the point for which it was cited. The question there arose upon the pleadings. The plaintiff having agreed, *inter alia*, to perform a certain voyage, and to sail with convoy, sued and alleged performance of the voyage, but did not allege a sailing with convoy. The pleading was held sufficient. Upon a further question being raised that the plaintiff having alleged a delivery of the goods in like good order and condition as when received, and it appearing that certain chests of tea had been

damaged by the negligence of the carriers, it was insisted that the plaintiff could not recover his freight; but the court held that the plaintiff might recover his freight, and that the defendant had his cross action for his damages; but the question does not appear to have been raised, whether he might not also have his remedy by recoupment in the same suit.

The case in 6 Taunton, seems to be an authority to the point for which the libellant's counsel has cited it; but I am satisfied that the common law courts of this commonwealth hold a different doctrine.<sup>1</sup> This too is an admiralty court, which is not bound by the decision of the common law courts in a question of remedy. It is to be observed that no authority has been cited to the point that this defence would not be allowed by a court of admiralty. And on the other hand, the language of Judge Story, in the case of *Willard et ux. v. Dorr*, 3 Mason, 161, 171, is broad enough to cover the defence, although not expressing it in terms. Considering the question upon principle, there seems no reason for not allowing this defence. The libellant claims under a contract for freight. The defence goes to the question, how much, if any thing, he ought to recover for services under that contract. The claim and the defence are on the same contract, and the evidence necessary in each may, to a considerable extent, be the same, as, for instance, on the question of the delivery of the goods by the libellant.

It may be said, as there is no general doctrine of set-off recognized in admiralty, suppose the case of the damage being greater than the whole freight, there can be no decree against the libellants for the excess. I do not hold that the respondents are obliged to resort to this mode of indemnity. They may have a cross libel if they so elect, and that must be the remedy, in case the loss is greater than the freight, if they seek to recover more than the amount of the freight. If the respondents choose to set up the damages by way of recoupment to a claim for freight, and the damage proved is greater than the freight, I should not sustain a new libel afterwards for the excess.<sup>2</sup> To refuse to allow this defence might cause much embarrassment to respondents, as in the case of a foreign ship, which may have left the port before the libel for freight is

<sup>1</sup> See acc. Sedgwick on Damages, 2d ed. c. xvii. p. 145. — Ed.

<sup>2</sup> See acc. *Britton v. Turner*, 6 N. H. 481; *Fabricotti v. Launitz*, 3 Sandf. 743. — Ed.

brought. To put the respondents to a cross libel for damage, in such a case, might be a denial of justice.

It is further to be observed, that this is a question of remedy, and not a question of right. It would lead to embarrassments if different courts held different doctrines as to the rights of parties; but as to the question of remedies, each court will administer them according to its constitution and jurisdiction. I shall allow this defence; and upon the facts I am satisfied that there was negligence on the part of the ship; and that the respondents are entitled to some damages. A more difficult question is, to what amount. It appears from the evidence that some loss would necessarily attend the transportation of those articles at that time of the year. I am satisfied that the great loss in this case (above the necessary leakage) was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune of the shipper or consignee, and that it is not practicable to ascertain with precision for how much of the loss the one party or the other are in fact responsible. I am, therefore, obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by courts of admiralty in cases of collision when both parties are in fault. In these cases the aggregate amount of the damages and costs are divided equally between the parties.

Let the decree be made up in this case by deducting for the ordinary leakage two gallons per barrel, and from the lard three pounds per tierce. And deduct from the amount of the freight one half of the value of all the loss above that amount; and let each party pay one half of the aggregate costs of suit.

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*District Court of the United States. District of South Carolina. July 12, 1856.*

THE UNITED STATES *v.* THE OWNERS OF THE THOMAS SWAN.

The act of Congress of 30th April, 1852, c. 106, §§ 3, 4 and 5, providing that vessels propelled by steam and carrying passengers, shall be provided with certain pumps, life-preservers, &c., applies to a vessel so propelled which actually carries passengers, although not usually and regularly engaged in that business.

Negro slaves, shipped by their owner, are passengers within the meaning of this act.

An inspector under this act, although he may be the informer, is not entitled to any part of the penalty, (as he would have been under the act to which this is in addition,) and is therefore not disqualified by interest from testifying in behalf of the libellants.

THE facts of this case appear sufficiently in the opinion of the court.

MAGRATH, J. — The questions which are raised in this case involve the consideration of certain portions of the Act of Congress, passed 30th August, 1852, and also the Act of Congress passed 7th July, 1838.

The object of both acts is to provide for the better security of the lives of passengers on board of vessels propelled in the whole or in part by steam. And the Act of Congress passed 30th August, 1852, was evidently intended to embrace every provision which could be suggested as likely to assist in the accomplishment of an end so meritorious, and provide against the recurrence of accidents, so shocking as had been those which preceded, and induced its enactment. The 3d, 4th, and 5th sections of the Act of 1852 are those of which, in this case, it is complained, there has been a violation. These sections provide that every vessel propelled by steam, and carrying passengers, shall have pumps of a certain description, to be placed in certain designated parts of the vessel, with suitable and well fitted hose attached to each; and pipes for the supply of these pumps passing through the sides of the vessel, so low as to be at all times in the water when the vessel is afloat; that every such vessel shall have at least two good and suitable boats, supplied with oars, one of which shall be a life boat, made of metal, fire proof, and in all respects a good substantial, safe sea boat, capable of sustaining inside and outside fifty persons; that every such vessel shall also have a good life-preserver, made of suitable material, or float, well adapted to the purpose, for each and every passenger, with buckets and axes.

The steamer *Thomas Swan*, in the month of September, 1855, made a voyage from the port of Baltimore to the port of Charleston, having on board, according to her manifest, seven negroes belonging to Thomas Petigru. Those negroes, according to the receipt, were to be delivered to Robertson, Blacklock & Co., "paying the passage and other customary expenses, the danger of the sea and other casualties excepted." By a memorandum indorsed on this

receipt, it is provided that the negroes in their transportation would be "at owner's risk of loss or injury."

The libel charges that the steamer *Thomas Swan* is a vessel propelled by steam, carrying passengers, and has incurred the penalty provided in the Act of Congress, of 1852, because of the absence of the several provisions for the security of passengers, to which I have adverted.

On the part of the United States, Elias E. Hughes, an inspector under the Act of 1852, was produced as a witness, and exception was taken to his competency on two grounds. 1st, Because he was a party to the record; and 2d, Because he was interested in consequence of the Act of July, 1838, to which the Act of August, 1852, is an amendment, providing that the penalty in cases under it, shall be divided between the United States and the informer.

I have overruled the objection on both grounds. It is true, that the name of Elias E. Hughes is mentioned in the libel, but it is not necessarily there; is not connected with any part of the libel, and may have been altogether omitted. To the mention of his name, as it occurs in this libel, I attach no more consequence than, if this were an indictment for a misdemeanor, I would give to the fact, that the prosecutor's name was attached to the affidavit annexed to the warrant, and on which the indictment rested. It may be true that he gave the information, but this is not a prosecution in behalf of Elias E. Hughes, but of the United States. It is not the witness who asks the enforcement of the penalty, but the United States, whose laws are in this particular charged to have been violated. Nor am I able to find sufficient weight in the objection made to the witness on the score of interest, to exclude him on that ground. If I had come to the conclusion that the witness was entitled in case of conviction to the half of the penalty, I should even then have hesitated very long before I would, in sustaining the objection on that ground, defeat in a very great degree, if not altogether, the operation of this law. It is true that interest disqualifies, but it is also true that there are numerous cases in which, although the objection on the ground of interest is manifest, yet from necessity in such cases, the witness, although interested, is admitted to testify. The rule which applies to the admission of the testimony of an agent, although interested, is very familiar. I have not, however, any occasion to decide how far, in such a case as this, an informer who shares in

the penalty is thereby rendered incompetent ; because I do not perceive in what manner the interest of the witness is made to appear. It is true that the Act of 1838 does provide, that the penalty declared in its provisions shall be divided, and one half shall be given to the informer. But I find no such provision in the Act of 1852, and the questions raised in this case are really under the Act of 1852. The Act of 1852 declares, in the last section, that if a vessel is navigated without complying with the terms of this Act (1852), the owners and the vessel shall be subject to the penalties contained in the 2d section of the Act, to which this is an amendment — that is, the Act of 1838. If I had to stop here, I should feel warranted in deciding that this declaration of the amount of the penalty to which the owner or vessel would be liable, by reference to another act, would not be the re-enactment of any division, which had been made, in such preceding act, of the penalty so to be enforced. But in fact the Act of 1852 does not, in its subsequent provisions, leave room for argument on this branch of the question. By the 24th section, it is made the duty of the collectors, or other chief officers of the customs, and of the inspectors appointed under this Act of 1852, to enforce the provisions of law against all steamers arriving and departing; and the omission of this duty, by such collector or other chief officer of the customs, or inspector, negligently, or intentionally, subjects him to removal from office, and the penalty of one hundred dollars for each offence. The 33d section of the Act of 1852, provides the compensation which shall be paid to the inspectors under this act; and the 37th section of the same act provides, that any inspector who shall, upon any pretence, receive any fee or reward for his services rendered under this act, except what is herein allowed to him, shall forfeit his office, and, if found guilty on indictment, be otherwise punished, according to the aggravation of the offence, by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both. These provisions of the Act of 1852 would seem not only to make it clear that the inspector is not entitled, by virtue of this Act, to claim a share of the penalty; but that such inspector, if he should receive more than the compensation declared by the act, would be subject to the very heavy penalties therein declared.

The witness was then examined, and proved that in the case of the steamer *Thomas Swan*, he examined her at

the time of her arrival in this port, in September, 1855; that there was a clear violation of the Act of 1852, in the omission to provide any of the articles set forth in the 3d, 4th and 5th sections of the act. The transportation of the negroes was proved by the testimony of Thomas H. Jervey, the deputy collector, who gave in evidence the admissions of the captain.

It was argued that the penalty did not attach, because the Act of 1852 related to vessels propelled by steam and carrying passengers; and that in this case the steamer was not a vessel engaged in the business of carrying passengers; that the provision made for the security of passengers under the Act of 1852, as appears by its numerous requisitions, was intended for such vessels as were employed in the business of transporting passengers, and was not intended for such as occasionally carried passengers. I can find nowhere in the letter of the act, nor in the mischief which the act was intended to relieve, any such exception as is contended for. The great object was to save human life; the means adopted were certain safeguards and precautions, which, in case of accident, would mitigate the horrors which attended the happening of those accidents then so frequent. I cannot consider that Congress intended to say that these safeguards should be provided in certain vessels and not in others. It intended to protect human life, by these modes, so far as it could; and in all vessels which were subject to such accidents as these safeguards might avert, or at least mitigate in their consequences. Whenever a vessel propelled by steam, and therefore liable to these accidents, undertook to carry passengers, and, in doing so, exposed them to the dangers against which Congress intended to provide, then, and in every such case, it was a vessel carrying passengers, within the letter and the mischief of the act, bound by all the provisions and subject to all the penalties which are expressed in the act. It is said that such a requisition on a vessel which does not generally carry passengers is oppressive. If it does so operate, the relief is very accessible — let it refuse to carry the passengers. But while it carries passengers, and receives hire for it, it must conform to such requisitions as are by law imposed on vessels propelled by steam with passengers on board.

It was further urged, that in this case the subjects of transportation were negroes; that they are recognized as chattels, and are not to be understood as included in that class described in the Act of 1852 as passengers; that when

transported they are taken as property; for them freight is paid, not passage-money; that like other chattels they are under the protection of the owner, and Congress has no right to legislate at all in relation to them.

When the argument is attempted to be strengthened by a reference to the difference between the term freight and passage-money, as being in themselves sufficient to describe the subject to which they are applied, a significance is given to them much more important than is deserved. Freight, in the general legal sense of the term, means all reward, hire or compensation paid for the use of ships. (Abbott, Story, Ed.) It adds to convenience in general use, to adopt the one term or the other, according to our wish to be understood as referring to persons or property.

But we find numerous instances where freight of the person is the term used to designate the hire of the carriage of the person. I could not, therefore, if the fact was, as the argument assumes it to be, decide that negroes are not passengers under the Act of 1852, merely because the hire of their carriage from the port of Baltimore was termed freight and not passage money. But it is not so. The receipt of the captain, produced in evidence, expresses the obligation of the owner to pay "the passage money and other necessary expenses." And did I give to the argument all the weight that is claimed, I should only, in so doing, provide the means for holding the owners to a contract, entirely different from that which they profess to have made.

Although the negroes in this case were the property of an owner whose authority to hold, control, and dispose of them, is recognized and enforced by the laws of this State, I cannot perceive the inconsistency nor the impropriety, nor the interference which is said to be involved in extending to them all the protection that, in the Act of 1852, is attempted to be provided against the carelessness or accidents of a carrier. Various laws provide in the case of the carrier for the security of property and life. But no rule of law, ever declared, which increases the security of property in the hands of a carrier, has been held to be an interference with the rights of the owner. His rights cannot be more fully recognized than in the multiplication of the securities which the law gives him for the protection of the property in which his rights are involved. It is said that the protection of the slave is committed to the master, and

not to the Congress of the United States. But the same thing may be said of any other chattel of which the owner is possessed. The rule of property in the case of the master and his slave is the same, unless limited in certain particulars, as I shall presently show, as is enforced in the case of a horse or a bale of goods. And to claim for a subject the incidents of property, including the right of ownership, is to affirm its right to such protection from laws made or to be made, as the legislative department of the government may deem proper. Indeed, it would be difficult to illustrate the fitness of this view more conclusively than by giving practical effect to the argument which is addressed to this part of the case by the respondent. Suppose that the Act of 1852 contained an express provision that it should not be held applicable in any case where negroes should be the only persons carried. Would not such an enactment, as well on the ground of humanity as of right, be exposed to the severest censure? The owner would have an irresistible claim to a repeal of such legislation, as not only thus excluded his property from the protection which, in other cases, it gave to human life, but in such exclusion, from its peculiar qualities, afforded it in fact less protection than it gave to a bale of merchandise. For, in addition to all such other qualities as are in a bale of goods as property, in the negro, as property, there is life,—the essence of the right itself. Refuse protection to that, without which the right of property is valueless, and the subject of property to which such refusal extends, is less protected than another piece of property, which does not require that protection.

Although, according to the law of South Carolina, the negro is the property of the owner, and a sale or transfer, voluntary or otherwise, is made in the manner and according to the form that is used in reference to a chattel; yet the law of South Carolina, in many particulars, distinguishes between the negro as the subject of property and any other chattel. The owner of a bale of goods may destroy it if he is pleased to do so; but the owner has no such right in relation to his negro. A cruel beating of a slave is an offence against the law of the State of South Carolina; and if the owner shall take the life of his slave, he may incur the same penalty that awaits him who takes the life of one of his own class. The law of South Carolina does not regard the ownership in all respects as absolute, but in a case of life, and even in a case of cruel

beating, subordinate to the provisions just referred to. And in this, the law of the State, and the law of the United States concur; for they are both enacted for the protection of life, and its security from such dangers as result from malice or neglect.

But it is not only in such cases as I have alluded to that a discrimination is made between the negro, as the subject of property, and any other chattel. The will, which in the negro operates as a motive of action, is recognized in all cases where its effects are developed, as materially qualifying the liability of those who otherwise would be held responsible. A carrier who would otherwise be liable for the loss of a negro, as he would be of any other chattel committed to his care, is relieved of such liability when the loss is made to appear as the consequence of the exercise of his will, on the part of the negro. And even in cases where the negligence of an agent who is charged with the care of negroes is established, but the proximate cause of the loss, although connected with such negligence, is to be referred to some direct exercise of the will, the agent has been relieved from liability; when in the case of any other chattel, the same negligence, resulting in loss, without the intervention of any quality like that of the will, breaking the immediate connection between the negligence and the loss, would have fixed his liability.

It seems to me, then, quite clear that, although the negro is regarded, in law, as but a chattel, yet the discrimination recognized by the same law, between the negro and any other chattel, is sufficient to bring him within the definition of a passenger. "Every person who pays a stipulated sum for his passage, or is on board in any shape, even free of charge, and has neither interest in the cargo nor belongs to the ship's crew, is a passenger." (Jacobsen.)

It is therefore ordered and decreed, that the respondents pay to the libellants the penalty of five hundred dollars, provided in the Act of Congress of 30th August, 1852, with the costs of these proceedings.

## Notes of Cases in Connecticut.

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We have received from our correspondent in Connecticut a full report of a very interesting case, on which the Supreme Court of that State was divided in opinion. We regret that our limited space and the rule we have laid down, of not publishing entire cases which will appear in full in regular reports, must prevent our giving more than an abstract of it.

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## WILSON ET AL. v. THE STATE OF CONNECTICUT.

*Indictment — Former conviction — Identity of offence — Shop and warehouse.*

THIS was an information against the plaintiffs in error, charging them with breaking and entering the shop, store, and warehouse of the president, directors, and company of the Windham Bank, in the night time, burglariously and with intent to steal the goods, &c., of said company, there deposited.

The plea set up a former conviction for larceny of the same goods, &c., the intention to steal which was alleged in the present case. The opinion of a majority of the court was delivered by STORRS, J., (now Chief-Justice,) to the effect that

The offence of burglariously breaking and entering a shop, store, and warehouse, with intent to steal, (Stat. 1854, ch. 312, § 39,) is complete without an actual larceny. The latter, if committed, is a distinct offence, although the theft ensued upon the breaking.

It follows that a conviction for such larceny is not pleadable in bar against a subsequent prosecution for the breaking.

Generally, to constitute a legal identity between two offences, so as to make an acquittal or conviction of one an available defence against a prosecution for the other, it is necessary that the averments of the second information should be such, that, if proved, they would have warranted a conviction under the first.

Although there is a strong current of American authorities in favor of so modifying the foregoing rule, as to treat a conviction for a less offence, which is an ingredient of a

greater crime, as a bar to a subsequent prosecution of the greater, this doctrine, if it exists, is inapplicable to the offences of theft and burglary under the Connecticut statute.

Whether, if the second information should charge a burglary and larceny, an acquittal in a former prosecution for the larceny, would be a defence, *quære*.

The same rules govern cases of former acquittals and former convictions.

In Connecticut, a banking-house is well described as a store, shop, and warehouse of an incorporated bank.

WAIT, C. J., dissented, on the ground, that the essence of the offence in both cases was the intent to steal; without such intent being proved, a conviction in the former case could not have been had. Also, that the breaking in and stealing were parts of the same transaction, and could not be severed at the will of the prosecuting officer. His honor referred to a decision in 7 Conn. 414, that under a statute making it a crime for a person to have in his possession a counterfeit bill, knowing it to be such, with intent to pass the same, a conviction for having one such bill would bar a prosecution for having another at the same time, although they purported to have been issued by different banks.

#### ADAMS ET AL. v. NASH.

##### *Amendment — "Ground of action."*

The phrase "ground of action," in the Connecticut Statute of Amendments, (Rev. Stat. tit. 1, ch. 8, § 102,) is not used in a technical sense, but refers to the real object of the plaintiff in bringing his suit.

In deciding upon the admissibility of an amendment the court will look not merely at the face of the declaration, but also at the extrinsic circumstances of the case.

Where, in an action on the case, it appeared that the ground of action was the non-delivery of gold which the declaration alleged had been intrusted to the care of the defendants generally and not in any particular capacity, it was *held* that the plaintiffs' declaration might be amended by additional counts, with new averments as to the manner, time, and place of the reception of such gold.

Where, in the other counts of the declaration, it was

alleged that the gold was entrusted to the defendants as common carriers to carry from N. to P.:—

*Held*, the declaration might be amended by averring other places.

### Notes of Cases in Vermont.

*Supreme Court of Vermont. General Term for the counties of Addison, Rutland, and Bennington.*

*Addison County. MOSS v. HINDS.*

*General replication, de injuria — Amendment.*

THIS was an action of trespass to recover the value of property sold by a town tax collector. The plea in justification alleged, in detail, the legality of all the proceedings in assessing and collecting the tax. The replication was not in form *de injuria*, putting in issue each particular fact in the plea, this form of pleading having been held bad at a former term in the same case. *Crogate's Case*, 8 Co. R. 66. This being a justification, by authority of law, partly lying in record, and partly *in pais*, cannot all be tried by the same tribunal, as it must under the replication *de injuria*. So, too, at the present trial, where the party attempts to put in issue several distinct matters, as the legality of the assessment, and the regularity of the proceedings of the collector, it is liable to the same exception. It is virtually *de injuria*, as far as it is carried. The plaintiff must elect to go upon one single ground of exception to the justification, but this need not necessarily consist of one single fact. *Robinson v. Haley*, 1 Burrow, 316; 1 Smith, L. C. 241, *et seq.* and notes. The replication was therefore adjudged insufficient. Either party is, by a general rule of this court, allowed to amend any formal defect in pleading, by paying costs, during the pending of the demurrer, and taking none for the same time, and this even after judgment announced.

**WHITE & HALL v. BURROW, VAUGHN & Co.***Action in favor of the bailee of goods.*

This was an action in favor of a common carrier of goods, who, after putting them in a boat upon Lake Champlain, employed the defendants, owners of a steamboat, to tow their boat upon the lake. Through the defendants' want of ordinary care, the goods and boat were lost. The boat was the property of one of plaintiffs, but the owner had contracted with the other plaintiff, that it should be used in their joint business of common carriers, through the season. The question made in the case was, whether the value of the goods and the boat could be recovered, or only the special injury which the plaintiffs had sustained up to the time of trial, there being no proof in the case that the owner of the goods or the boat had made any claim upon them for compensation, and it not being claimed, that the plaintiffs were liable jointly for the loss of the boat.

BY THE COURT. — It has been settled for a very long time, that one having a special property in goods, and the actual possession, may recover for any injury done them while in his custody. So, too, may the general owner sue, if he choose; and if he do, the bailee cannot maintain his action, perhaps, but so long as the general owner acquiesces in the suit of the bailee, he may prosecute and may recover the value of the injury, and this recovery will bar the claim of the general owner. Upon this principle we think the plaintiffs entitled to recover the value of the boat and the goods. 2 Kent, Comm. 7th ed., 750, note c.

**LAWRENCE v. DEWEY.***Covenants dependent and independent — Assumpsit for goods delivered upon a sealed instrument.*

This was an action of assumpsit for coal delivered and accepted at defendant's forge. The parties made a contract, under seal, September 4, 1853, for plaintiff to deliver 68,000 bushels of coal, — 13,000 before the 1st of December, 20,000 more before the 1st of April, 1854, and "the balance before the 1st of September," 1855. The plaintiff delivered some before the first day named, and more before the second day, but less than the quantity stipulated. In May, 1854, the defendant promised, in consideration that plain-

tiff would continue to deliver coal, he would not take advantage of plaintiff's failure to perform the contract, but would pay for what coal was delivered. The contract originally contained a covenant to pay monthly for what coal was delivered.

The court held the defendant's covenant dependent upon the performance of plaintiff's covenant, according to its terms, and not independent, or covenant for covenant.

But that defendant's waiver bound him to pay, not only for the coal thereafter delivered, but all that had been delivered before that time, and that assumpsit was the proper remedy.

*Rutland County. HODGES AND WIFE v. GREEN.*

*Contract for sale of interest in lands — What portion within the Statute of Frauds.*

This was an action to recover the price of a pew, in the meeting-house at Rutland, built by a company, formed under the statute. The defendant agreed to take the pew, at a price stated, but the contract was not reduced to writing. The defendant, as committee, proceeded to remodel the house and destroyed the pew. A deed was made of the pew, after its destruction, and tendered, but not accepted.

The court held, that defendant, having accepted and used the pew, was bound to pay for it. And that the contract was so far executed as to vest the title in defendant. And that all which savored of any interest in land being conveyed, the plaintiff might recover the price, without proving the contract reduced to writing. Some of the late English cases seem to hold a different doctrine; but the American courts, especially in Massachusetts, New York, and Vermont, allow the price of land conveyed to be recovered, without showing a contract in writing to pay such price, the contract to convey the land only being regarded as within the Statute of Frauds.

*Bennington County. DICKINSON v. KING.*

*Promissory note as collateral — When payment.*

This was an action to recover the balance of an account. The plaintiff had received a promissory note, as collateral

to the debt. This note had been negotiated and sued in the name of the indorsee, and judgment rendered thereon in favor of the indorser, against the defendant, but defendant failing to pay the same, the plaintiff had paid the amount as indorser, and taken back the note, which he brought into court and offered to surrender.

The court held, that while the note was outstanding, in the hands of a *bonâ fide* holder, it must be regarded as payment upon the amount, *pro tanto*. But that after it was received back by the plaintiff, it was the same as if it had never been negotiated. And that the judgment in favor of the indorsee would make no difference, that being virtually extinguished by the payment of the plaintiff to the indorsee.

PATCHIN v. STROUD.

*Effect of suffering possession of land to remain vacant.*

The Statute of Limitations in this State is fifteen years, in regard to right of entry upon lands. The plaintiff claimed title to the *locus in quo* by fifteen years possession, in different persons, under whom he claimed. After the death of one of the former occupants more than fifteen years elapsed, before any distinct act of possession was exercised by his heirs upon the land. The court below charged the jury, that this hiatus will deprive the plaintiff of all benefit of the possession of the ancestor, he claiming under the heirs. But the court held, that whether the former possession was abandoned, so that the plaintiff should be compelled to show title to the premises, and could not rely upon the former seizin of those under whom he claimed, was matter of fact for the determination of the jury under all the circumstances, and did not depend upon any definite period of time. It must appear that the possession was left without any intention to keep it up, and at some convenient time to resume it.

BARNEY v. GROVER.

*Date of surety's claim against the principal for money paid on his behalf.*

This suit was prosecuted on behalf of an assignee, who took a *bonâ fide* assignment of the debt, and gave notice to the defendant. At the time of this notice, defendant had

become surety for plaintiff, but had not paid anything. Subsequently he had paid an amount greater than the amount due upon the debt in suit. The assignee resisted the set-off, on the ground that it accrued subsequent to his purchase and notice to defendant.

But the court held, that defendant's equitable claim to set-off was superior to that of the assignee, and was to be reckoned of the same date as his becoming surety, there being an implied undertaking of the principal from the first to indemnify. *Strong v. Mitchel*, 19 Verm. R. 644; *Ward v. Leland*, 1 Metc. 387.

March Term, 1856. *Windsor County. WOODSTOCK v. GALLUP.*

*Highway*—*Jurisdiction of County Court and of this court*—*Certiorari and mandamus.*

In laying highways in Vermont, the whole case is first to be referred to commissioners, appointed by the County Court, and if the commissioners report against laying the highway, or in favor of laying it, on insufficient reasons, as for embellishment and ornament chiefly, it is not competent for the court to establish it.

But if they assign those reasons as incidental and accessory to that of public interest and private necessity, it makes a *prima facie* case for establishing the highway; and the objectors may then contest it upon its merits before the court, who are the ultimate tribunal for the determination of that question.

But if the County Court refuse to proceed to determine the case upon its merits, and dismiss the petition, on the alleged ground of defect in the report, which does not in fact exist, this court may correct the proceeding upon *certiorari* by bringing up the record and reversing the judgment, and hearing the case here, or remanding it to the court below, with a mandamus, in the nature of a *procedendo*, to hear the case, and determine it upon its merits. But in a case not in any event to be proceeded with in this court, it is more in analogy to our proceedings on writs of error, after having heard the case, as we always do, upon the application, to issue the mandamus and *procedendo*, in the first instance, as there is no necessity of bringing the record here if it is immediately to be remanded.

**Notes of Cases in New York.**

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*Common Pleas for the City and County of New York.  
General Term. July, 1856.*

GRIFFIN v. RICE.

*Banks — Assignment — Set-off.*

GRIFFIN sued Rice, as president of the Atlantic Bank, and claimed as assignee of Benedict & Co., by a general assignment, to recover moneys collected by the bank out of collateral notes, deposited as security for other notes discounted by the bank for Benedict & Co. On the part of the defence, it was alleged and proved that after the assignment, and without notice thereof, the bank had paid a note of Benedict & Co., which, in the usual course of business, had been made payable at the bank; and the defendant claimed to be allowed, as a set-off, the amount of such note. This was refused, and judgment rendered for plaintiff, from which defendant appealed.

The respondent insisted that the assignment of Benedict & Co. to the plaintiff, vested in him for the benefit of creditors (the bank among the rest) whatever sums might be due that firm in the hands of the bank. The bank had no claims superior to other creditors, and must share with them in the loss occasioned by the failure of the assignors.

INGRAHAM, J., sustaining the appeal and reversing the decision below. — As between Benedict & Co. and the bank, I think there could be no doubt that the defendants should succeed in the defence set up by them . . . . Is there anything then in the fact of the assignment to the plaintiff to alter the rights of the defendants to this defence? Had a notice of the assignment been given to the bank, a different question would arise; but without such notice, the bank was justified in making the payment, just as much as they would have been in paying a check drawn by a firm upon the bank. I do not think it necessary to examine the question as to the right of the bank to hold collaterals for other debts than those for which such securities were specially pledged. I am disposed to put this case on the broader ground of the right of the bank to pay notes and

checks for the dealer, at his request, even after he has made an assignment, until notice of such assignment is given to the bank. The proposition is a monstrous one, that banks receiving money of and for their dealers, to be paid out on their checks and notes, are not to be protected as to payments made by them in the ordinary course of dealing of such banks, when the dealer sees fit privately to make an assignment of his effects, and the notice of such assignment is withheld from the bank.

DEUELL *v.* CUDLIPP.

*Assignment — Conversion.*

Trover against a pawnbroker, by the assignee of a diamond ring, for the unlawful detention thereof.

INGRAHAM, J.— . . . . In *McKee v. Judd*, 2 Kernan, 622, Sept. 1855, in which the Court of Appeals held that a right of action for the conversion of personal property was assignable, the instrument of assignment was a general conveyance of all the assignor's property and estate. In the present case the assignment transfers nothing but the property, and without a demand or refusal, or a conversion after the assignment, the present plaintiff could maintain no action for the property. . . . In order to have brought this case within the rule as laid down in 2 Kernan, 622, the assignment should have transferred any cause of action for the conversion, and the mere transfer of the property does not give a right of action against a party who has ceased to detain it before the plaintiff's title accrued.

GILDERSLEEVE *v.* MARTINE, impleaded with Kipp and Brown.

*Competency of witnesses.*

Action on a promissory note, of which Martine was the maker, and Kipp and Brown the payees and indorsers. The defence alleged that the note was made for the accommodation of one O'Kell. On the trial, O'Kell was offered as a witness on behalf of the defendant Martine. It was objected that he was incompetent. It was admitted by the defendant's counsel that the note was made by Martine, and indorsed by Kipp and Brown, for the accommodation of said O'Kell, and that said O'Kell was the party in in-

terest, for whose benefit the suit was defended. The sections of the New York Code, upon which the question turns, read as follows :

Section 398. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

Section 399. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended.

*Held*, under these provisions, that O'Kell was properly excluded as an incompetent witness, for the reason that the suit was defended for his immediate benefit.

#### GODDARD v. FRANCE & BATES.

*Assignment — Set-off — Examination of co-defendants and attorneys.*

Action against copartners, to recover \$225 for goods sold and delivered. The defendants had made payment in goods to the amount of \$148.

*Held*, that payment in goods made on account of a purchase, should be credited in an action for such purchase-money, although the party making the payment has assigned his claim to recover back such goods, on the supposition that such contract has been broken.

Under section 397 of the Code, a defendant not served may be summoned as a witness for a co-defendant. Where a defendant is offered as a witness he should be sworn, and the questions which relate to the joint liability excluded.

The rule which protects communications between the lawyer and his client from disclosure, is not confined to cases where the party to the suit is the client; but extends to all persons between whom the relation of client and counsel exists.

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#### Notes of Recent English Decisions.

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*Exchequer Chamber. May 1.*

CORVIE v. STERLING.

*Promissory note — Insufficient designation of payee.*

The defendant made this instrument. (Date.) "Nine months after date, I promise to pay to the Secretary for the

time being of the Indian Laudable and Mutual Insurance Society, or order, company's rupees, 20,000, with interest at the rate of six per cent. per annum, and I hereby deposit in his hands twenty-two Union Bank shares as particularized at foot, by way of pledge or security for due payment of said sum of company's rupees, 20,000, as aforesaid, and in default I hereby authorize the said Secretary for the time being forthwith" (to sell and apply the proceeds, &c.) The plaintiff was secretary of the society at the time the note was made and ever since.

*Held*, affirming the judgment of Queen's Bench, that the note was made payable to the person who might be secretary of the society when it became due, and was therefore void as having no definite payee.

May 9. JANSSEN *v.* RALLI.

*Insurance — Goods warranted "free from average unless general" shipment in bags, and loss of certain number of bags.*

Action to recover for loss of certain linseed underwritten by the defendants. The plaintiff was insured by an open policy on goods to be shipped from Calcutta to London, with the usual memorandum that linseed was "warranted free from average unless general or the ship be stranded." The indorsement was thus: "Per Waban, 2688 bags linseed, 1600*l.*" The ship met with heavy weather, and was forced to put into the Cape of Good Hope, where 1023 bags were in such a state from sea damage that a large portion of the linseed in them was thrown into the sea as worthless, and the rest sold for a few shillings, and if sent on, would have lost the character of linseed before reaching England.

*Held*, that the insurance was on the linseed as a general subject of insurance, and not on each bag, and that, therefore, the assured could not claim for a total loss of the 1023 bags, but the underwriters were exempted by the warranty. CAMPBELL, C. J., delivering the opinion of the court, distinguished the case from *Davy v. Milford*, 15 E. 559; the latter, he said, was a case where a part of the flax insured was totally lost, and the assured was allowed to recover for that part; but it did not turn at all upon the fact that the flax was in separate mats. All the other cases cited were merely *dicta* founded upon a mistaken view of *Davy v. Milford*, and the foreign and American authorities were clearly for the defendants.

*Admiralty Instance Court. April 25.*

## THE ZOLLVEREIN.

*Collision — British and foreign vessel — Not bound by British law.*

A collision occurred on the high seas between a British and a foreign vessel; the latter was in fault, and would, by the general maritime law, be bound to respond for the damage, but the British vessel had not observed the rules laid down by the Merchant Shipping Act.

*Held*, that the foreign vessel was not bound by the statute law of Great Britain, and therefore could not set up the violation of that law by the British vessel, but the general maritime law must govern the case.

*House of Lords. May 9.*SAVERY *v.* KING.*Solicitor and client — Parent and child — Constructive fraud — Undue influence.*

Where a solicitor purchases or obtains a benefit from a client, or a parent from a child recently emancipated, a court of equity will not uphold the transaction, unless it appear that the client or child was free from the influence which is presumed to exist in these relations.

Therefore, where a son, soon after attaining his majority, and while living with his father, joined with his father in mortgaging to their solicitor an estate of which the father had a life estate and the son an estate of inheritance, to secure an existing debt of the father, and it was not shown that the son received any adequate consideration for the conveyance, or any independent advice, he was allowed, after an acquiescence of twelve years, to set aside the mortgage, it not appearing when he was first informed of the true nature of the transaction.

*Court of Appeal in Chancery. March 19, and April 26, 1856.*MARTINEAU *v.* ROGERS.*Will — Legacy, whether for life or absolutely.*

A testator gave to his nephew E. M. 2000*l.*, and a like sum to another nephew, and to a niece, "if they respectively

survive me and attain the age of twenty-one years, when the legacies to my nephews are to be paid. In case of the death of either of my nephews or of my niece, leaving issue, such issue to take the parent's legacy, as by his or her will directed; if no will, equally; but in case of the death of either of said nephews or niece before his or her legacy payable, his or her legacy to go to survivors of said nephews and niece during the minority of said nephews and niece, or any of them trustees, to apply income of legacy for maintenance and education; the legacy of my niece, and any share she may acquire by death of her brothers to be settled for her separate use, with power by will to dispose of principal amongst children, if any; if no will, amongst children equally; if no children, to sink into residue."

*Held*, that the nephews were entitled to the income only of their respective legacies for life, with power of appointment by will among their children, and if no children, the fund would belong to them absolutely.

*V. C. Wood's Court. March 13.*

PELLEW v. HORSFORD.

*Will — Construction — Household goods.*

A curious astronomical clock, which had belonged to Napoleon Bonaparte, and had been taken from a prize captured by testator's father, but which had not been kept in testator's house, but at the shop of a chronometer maker, for sale; *held*, to pass as "household goods" to testator's widow.

*Court of Appeal in Chancery. March 19, and April 26, 1856.*

*Re STRAHAN. Ex parte GRAVES.*

*Trustee — Duty of new trustee — Bankruptcy — Reputed ownership.*

A new trustee under a marriage settlement containing a covenant for settling after-acquired property is entitled, in the absence of notice, to assume that the funds accrued prior to his taking the trust have been got in.

A partner in a banking firm being a trustee, lent the

trust funds to the firm, which appropriated several bonds of third persons as security. The bond debtors had no notice of the appropriations, and the bank became bankrupt.

*Held*, that the *cestuis que trust* might insist upon the trust in respect to those bonds; and that they were not goods in the possession of the bankrupts as reputed owners by consent of the true owners, under the bankrupt act.

*Rolls' Court. March 7 and 14.*

INGILBY v. AMCOTTS.

*Will—Devisable interest.*

By the will of A. the H. estate was devised to B.; but in case B. should become entitled in succession to the K. estate, the testatrix devised over the H. estate to C. D. and E. as tenants in common. C. died, and F. was her heir at law; and F. died before the happening of the contingent event:—

*Held*, that F. had a devisable interest in the H. estate, which would pass by a general residuary devise, and his devisees were entitled in preference to the heirs of C., although if he had died intestate, those heirs would have taken upon the happening of the contingency.

*V. C. Stuart's Court. May 2 and 3.*

PROWETT v. MORTIMER.

*Injunction—Newspaper—Continuation of former newspaper by one not proprietor.*

The plaintiff purchased and became the proprietor of a weekly newspaper called the *Britannia*, which he afterwards amalgamated with another weekly newspaper called the *John Bull*. The new publication was issued under the name of the *John Bull and Britannia*. The defendant M. had been printer, publisher, and sub-editor of the *Britannia*, in which was published a notice of the intended amalgamation. After the amalgamation, on the next usual day of the publication of the *Britannia*, the defendant M. issued a paper called the *True Britannia*, resembling the *Britannia* in size and type, and purporting to be a continuation thereof. Upon bill by plaintiff, to restrain the publication of the *True Britannia*, an injunction was granted.

Common Bench. April 22.

LAWSON v. THE BANK OF LONDON.

*Pleading — Action for trading under name of another.*

To maintain an action for trading in the plaintiff's name of business, it must be distinctly averred that the plaintiff carries on such business.

Thus, where the allegation was that the plaintiff "established" a bank with a certain name, and that the defendants afterwards used the name, &c: —

*Held*, bad on demurrer.

Whether such action will lie against a corporation which uses the name given it by act of Parliament, *quære*. It seems (Willes, J.) that it would.

Common Bench. April 24, and May 7.

CLOSMADUE v. CARROLL.

*Evidence — Presumption — Burden of proof — Stamp on lost instrument.*

Where an action was brought on a charter-party which had been put into the post-office at C., to be sent to London and stamped, and returned to C., but had not since been found.

*Held*, that the burden of proving the want of stamp was on the defendant, and as neither party could distinctly prove his allegation, secondary evidence of the contents of the paper should have been received.

Queen's Bench. May 26.

HUDSON v. BILTON.

*Condition precedent — Vessel having sailed.*

A. drew an order, "please pay to B., on the Royal Oak, having load and sailed, out of the advance, 73/."

*Held*, the sailing of the vessel was a condition precedent, and that the vessel having loaded and proceeded over the bar, and standing off and on while the captain went ashore to get the clearance papers and sign the bills of lading, had not sailed.

*V. C. Kindersley's Court.*

EDWARDS v. MARTIN.

*Mortgage — Foreclosure for non-payment of interest.*

Where a mortgage was conditioned to pay a certain sum at the expiration of five years, with interest in the meantime half yearly, and default was made in the payment of interest:—

*Held*, the mortgagee was entitled to a decree of foreclosure.

*Queen's Bench. May 31.*

REYNOLDS v. BRIDGE.

*Covenant — Liquidated damages.*

A deed contained a covenant that A. should not practise as a surgeon or see patients, or introduce any other medical man in the town of W., but should introduce B. to all the exclusive patients of the said A., and use his best endeavor to secure them for B.; and provided, that in case of default, A. should forthwith pay to B. 2000*l.*, not in the nature of a penalty, but as liquidated damages:—

*Held*, liquidated damages, all the stipulations being of uncertain value.

*Crown Cases Reserved.**April 26. REG. v. RUSH.**Misdelivery of letter — Larceny.*

A letter containing a post-office order for money was delivered by mistake to A., who, after ascertaining that it was not for him, appropriated the contents to his own use.

*Held*, upon the authority of *R. v. Mucklow*, 1 Moo. C. C. 100, that a conviction for larceny could not be sustained.

*May 3. REG. v. ROEBUCK.**False pretences — Misrepresentation of article offered as a pledge.*

A false and fraudulent statement to a pawnbroker that an article offered as a pledge is of silver, is indictable as a

false pretence under the 7 & 8 Geo. 4, c. 29; and upon the trial of such an indictment evidence is admissible of similar misrepresentations made to others about the same time, and of the possession of a considerable number of articles of the same kind.

REG. v. BURGON.

*False pretences — Misrepresentation that a house was built on land offered as security.*

Where A. obtained money on the security of land by falsely representing that a house was built upon it: —

*Held*, he was rightly convicted of obtaining money by false pretences.

REG. v. GARDNER.

*False pretences — Personation — Obtaining board.*

A. falsely represented himself to be the pay-master of the Duke of Wellington, and thereby obtained board and lodging with the prosecutor.

*Held*, that he could not be convicted of obtaining specific articles of food by false pretences, because they were too remotely connected with the false representation.

REG. v. HODGSON.

*Forgery — Intent to defraud.*

To constitute the crime of forgery, there must be an intent to defraud some one, although by a recent statute the intent to defraud any particular individual need not be alleged. Therefore, where the prisoner altered a diploma of the College of Surgeons, by substituting one name for another, but without intending to wrong any one in particular: —

*Held*, he could not be convicted of forgery.

*Court of Appeal in Chancery. April 29, and May 7.*

MOLYNEUX v. ROWE.

*Will — Construction — General words limited by context.*

A testator, by his will, appointed executors, and gave all his real and personal estate upon trusts for the benefit of

his granddaughter. By a codicil he gave and bequeathed to his servant "the whole of my estate, and all my household goods and furniture, linen, china, watches, and all other my personal property and effects that I may be possessed of at the time of my death, free from the control or interference of any person or persons whatsoever, for his absolute use and benefit, free from the legacy duty; such gift and bequest, however, I declare shall not prejudice any claim or demand he may have against me or my representatives for wages due to him from me;" and ratified his will in all other respects:—

*Held*, (Turner, L. J., dissentiente,) that the gift in the codicil was only of the personal estate.

*Rolls' Court. May 11 and 12.*

**COX v. PARKER.**

*Devise—Trustee entitled on failure of trust and of heirs.*

A testatrix devised real and personal estate in trust for her son, and if he should die under twenty-one years of age and without leaving issue, her trustee was to stand seized of the property in trust to sell, &c., and pay certain legacies, and subject thereto she bequeathed the residue to the children of P. and E., which should then be living. The testatrix's son died during her lifetime, unmarried. The testatrix left no heir or next of kin.

*Held*, that the trustee was absolutely entitled to the residuary estate.

*Exchequer Chamber.*

**THOMAS v. BUTT.**

*Will—Construction—Estate tail.*

A testator, after giving the whole of his property to his wife for life, devised "to my grandson, R. P., that house and garden, &c.; to my granddaughter, A. P., this house I now live in, with the garden and orchard adjoining;" and made in the same general clause several devises and bequests to his numerous other grandchildren by name. And added at the end of the bequests, "In case either of

them die without issue, that portion to be divided among the survivors."

*Held*, (affirming the judgment below,) that this proviso governed all the devises and bequests, and that A. P. took an estate tail in the house, &c., devised to her.

*Exchequer. June 5 and 7.*

*AIKEN v. SHORT.*

*Assumpsit — Money paid under mistake.*

A. borrowed 200*l.* of the defendant, and gave him a bond and an equitable charge on certain real estate; the plaintiffs purchased A.'s interest in the property, subject to the charge, and on application by the defendant, paid off the charge. It turned out that A.'s title was defective, so that neither his charge, nor his conveyance to the plaintiffs, were good.

*Held*, the plaintiffs had paid in their own wrong, not being in any manner bound to pay this debt, and could not recover back the 200*l.*

Bramwell, B., referred to *Pritchard v. Hitchcock*, 6 Scott, N. R. 851.

*June 6. DE WAHL v. BRAUVE.*

*Alien enemy — Husband and wife.*

An English lady married to a Russian gentleman, but living apart from him and in England, made a contract before the war, in her own name, with the defendant, and during the war brought an action thereon in her own name. The defendant pleaded in abatement the non-joinder of the husband. The plaintiff replied that the contract was made by her while separate, &c., within the realm, and that her husband was an alien enemy. The defendant demurred.

*Held*, that the replication only showed a present disqualification and not a civil death of the husband, and that the plaintiff could not maintain her action.

*April 28, and May 31. SMITH v. REYNOLDS.*

*Insurance — Gambling policy — Profit on goods.*

Statute 19 Geo. 2, c. 37, § 1, renders void assurances on any British ship or on goods, &c., laden on board of

any such ship, "without further proof of interest than the policy." Where such a policy was made on profits of goods:—

*Held*, to be substantially a policy on goods, and therefore void.

*Queen's Bench. May 30.*

**ASHURST v. BANK OF AUSTRALIA.**

*Promissory note—Transfer after maturity—Bankruptcy of indorser before transfer.*

The defendants were the assignees of A., a bankrupt, and to an action by B., on a promissory note, indorsed to him by A., pleaded that the note was overdue and A. bankrupt at the time of the transfer.

*Held*, a good plea.

*Rolls' Court. April 22, and May 5.*

**DRYSDALE v. PIGGOTT.**

*Debtor and creditor—Insurance on debtor's life.*

A creditor insured his debtor's life, under agreement between them and a surety, that the first year's premium should be added to the debt; and the creditor paid the premiums for several years after the first, and the surety refused to repay him the second premium, and the debtor paid the debt, but did not repay the subsequent premiums, there being no evidence whether or not he had been requested to do so, and died, and the creditor received the insurance:—

*Held*, that the plaintiff, who was the surety and also administrator of the debtor, could not recover the amount of the insurance from the creditor, for the latter could not be considered the agent of the debtor in keeping alive the policy.

*Queen's Bench. June 5.*

**MARVIN v. WALLIS.**

*Statute of Frauds—Acceptance and receipt.*

A bargain for the purchase and sale of a horse was made orally, and the vendor (the plaintiff) then said to the ven-

dee, that he wished to make some journeys, and the vendee lent him the horse; there was never any manual transfer of possession, but the horse remained with the plaintiff about two weeks, when he was sent to the defendant, who refused to receive him.

*Held*, there had been a sufficient receipt of the goods to satisfy the Statute of Frauds, as the character in which the plaintiff held the horse had changed from that of owner to that of bailee.

*Common Bench. May 31.*

**HARMAN v. REEVE.**

*Statute of Frauds — Entire contract — Partly within the statute.*

Where a contract is entire, and the principal part is for the sale of goods above the value of 10*l.*, and the Statute of Frauds is not complied with, no action can be maintained on the contract.

*It seems*, that if the part not within the statute had been performed, the party may recover on an implied assumpsit the value of what he has performed.

*May 27. GREEN v. KOPKE.*

*Principal and agent — Liability of agent for foreign principal.*

An agent for a foreign principal contracted by bought and sold notes for the shipment and delivery of goods by his principal, and signed as agent:—

*Held*, he was not personally responsible.

*Queen's Bench. June 9.*

**EDWARDS v. WAKEFIELD.**

*Practice — Interrogatories — Plaintiff's title.*

In an action of trover by assignees of a bankrupt, the defendants cannot file interrogatories to the plaintiffs calling upon them to show "what title they intend to set up to enable themselves to recover," or "what act or acts of bankruptcy they intend to rely upon in support of their title as assignees.

## Miscellany.

ORATORY OF THE BAR. — In the volume recently published, containing the lectures of Professor Channing, as prepared by him for the press, but issued since his lamented decease, we find some excellent observations on the eloquence of the bar, from which, while commending the book to all lovers of elegant and judicious criticism, we make some extracts from his remarks on eloquence, as applied to arguments addressed to the court. The author is contending that true eloquence may find a place even in the discussion of questions of law. He says :

"How is it that lawyers of equal learning and prudence differ so much in the impression they make? Men go from a court of justice, after witnessing a severe contest, and in reporting their opinion of the arguments, they will say that one of the advocates had no fault that they can precisely define, and yet there was a prevailing heaviness or want of impressiveness. He did not take in the case as a whole, which he had at command, but appeared to be forever occupied with separate details. He certainly said every thing that could be said, with the utmost fidelity, and might even have spared much. He was intelligible and unexceptionable, and probably will gain the cause. But you should have heard the other. The moment he rose, in reply, it seemed as if he were commissioned to revive a fatigued audience. In a few words he made his opponent's argument clearer than he himself had done ; and then, with the utmost simplicity, directness, and strength, he stated his own grounds. The hearer was disposed, at first, to pity him for the perplexed and boundless range of argument or examination which he must travel over in his reply merely. But the field was soon brought within very moderate limits ; easy paths were opened through all that was obstructed, and a warm light fell upon the ground as the clouds were scattered from over it.

"If such illumination had been poured upon us in a work of elegant literature, we should not have scrupled to ascribe it to the magic of poetry. We should have admired the facility with which a man of genius could bring directly before our eyes a distinct picture of what seemed too vast, or involved, or abstract, for human comprehension. We should not have heard a word about the hostility between the logic of a reasoner and the inspiration of genius.

"And there is no such hostility. I have been describing nothing but the triumph of genuine argumentative eloquence, — an eloquence of a high order and influence, but unassisted by a single outbreak of passion. That a great orator of this class has in him the elements that constitute the most impassioned speaker ; that he is capable of the highest eloquence in the popular sense of the word, I am well convinced. I have only shown how skilfully he could adapt his discourse to the halls of justice. He had no occasion then for that popular argumentative eloquence which, besides working conviction, is to give a tone to an assembly ; which is to instruct the ignorant, kindle the indifferent, convert the prejudiced, conciliate the inimical, and impel the friendly. He needed only the succinct, elastic, transparent eloquence which makes bright the severest and least inspiring truth, and does it justice.

"To any who still think that something is wanting to the orator who is merely addressing the court, we may urge that there is a fountain of eloquence in the very purpose and bearing of every legal argument. A contest upon a simple point of law must involve to some extent the question of

right and wrong ; the duty of respecting our neighbor's claims ; the necessity of subordination. It must involve vindication and protection. The judge himself must be eloquent, when he speaks in behalf of public morals, liberty and order. The hearty lover of his profession must be eloquent when he sets forth the harmonious system of the law, its oversight of human affairs for the quieting of disputes, and the kind equality with which it extends security to all. Every cause in which a lawyer is engaged is of more or less importance to every one of us. And if he feels deeply that he is bound to do not only a duty to his client, but also an office in behalf of the public well-being, he will come to every legal discussion as to a contest for right, which the law has provided for, and which he is to bring under its protection. What power of an orator may not go forth to such a battle !”

CAVEAT. — A. B., Esq., who, as a member of the Suffolk Bar, must be considered as one “learned in the law,” lately had occasion to file a *caveat*. He walked into the clerk's office, and asked for a writ ; indorsed on the back of it “*Caveat emptor* — A. B. ;” and returned it to the astonished clerk to be filed ; and filed it was, and is still.

STATUTE OF FRAUDS. — IN giving judgment in a recent case, Lord Campbell is reported to have said, “So long as the Statute of Frauds continues in force, we must give full effect to it ; but I shall rejoice when it is repealed, because, in my opinion, it promotes, instead of preventing, fraud.” His lordship made a similar statement in his place in Parliament.

LORD COCKBURN, better known in this country by his life of his friend, Lord Jeffrey, than for his learning and social talents, which have given him a high reputation in Scotland, has recently published a book which he calls “*Memorials of his Time*,” and which contains a great many good anecdotes, especially of law and lawyers of old time, in Scotland. From the American reprint we make some extracts :

“The Whigs had only one opportunity of making a Scotch judge ; and they made Charles Hay, a man famous for law, paunch, whist, claret and worth. His judicial title was Newton, but in private life he was chiefly known as *The Mighty*. He was a bulky man, with short legs, twinkling eyes, and a large, purple visage ; no speaker, but an excellent legal writer and adviser ; deep and accurate in his law, in which he had had extensive employment.”

After describing his habits of drinking :

“Newton's potations and bulk made him slumberous both in society and in court ; and his management of this judicial inconvenience was very curious. In court his head generally rested either on his heaving chest, or on his hands crossed on the bench, while, after getting a grip of the case, his eyes were locked in genuine sleep. Yet, from practice and a remarkably quick ear and intellect, nobody could say anything worth hearing without his instantly raising his huge eyelid, and keeping it open, and directing his powerful knowing eye, like a mortar, at the speaker, till he got what was necessary ; after which, when the babbling began, down sunk the eyelid again, till lighted up by the next shot. The only way to waken him was to say something good, and this never failed. Accordingly no judge ever knew his cases better. Strangers wondered, but they seldom saw him rouse himself and deliver his opinion, which he was always ready

to do on the spot, without being inclined, by his accuracy of statement and luminousness of view, to despise the judges whose eyes had been open all the while. I never heard this able, kind, and honest man mentioned by anybody but with respect and affection."

Here is an account of a very different judicial character, who flourished somewhat earlier :

"Bacon advises judges to draw their law 'out of your books, not out of your brain.' Hermand generally did neither. He was very apt to say, 'My Laards, I *feel* my law — *here*, my Laards,' striking his heart. Hence he sometimes made little ceremony in disdaining the authority of an Act of Parliament, when he and it happened to differ. He once got rid of one which Lord Meadowbank (the first), whom he did not particularly like, was for enforcing, because the legislature had made it law, by saying, in his snorting, contemptuous way, and with an emphasis on every syllable, — 'But then we're told that there's a statute against all this. A statute! What's a statute? Words! Mere words! And am I to be tied down by words? No, my Laards; I go by the law of *right reason*.' Lord Holland noticed this in the House of Peers as a strange speech for a judge. Lord Gillies could not resist the pleasure of reading Holland's remark to Hermand, who was generally too impetuous to remember his own words. He entirely agreed with Lord Holland, and was indignant at the court suffering 'from the rashness of fools.' 'Well, my Lord, but who could Lord Holland be alluding to?' 'Alluding to? who *can* it be but that creature Meadowbank?'"

"In giving his opinion on the validity of a qualification to vote for a member of Parliament, after it had been sustained both here and in the House of Lords, he declared that, nevertheless, it was not only bad, but so bad that 'I defy omnipotence to make it good.' 'Then,' said the quiet philosophic Playfair, 'it must be very bad indeed; for his Lordship assured me, in a conversation about Professor Leslie's case, that he had no difficulty at all in conceiving God to make a world where twice three was not six.'"

Here is part of the opinion of this worthy judge in a criminal case :

"We are told that there was no malice, and that the prisoner must have been in liquor. In liquor! Why, he was drunk! And yet he murdered the very man who had been drinking with him! They had been carousing the whole night; and yet he stabbed him! after drinking a whole bottle of rum with him! Good God, my Laards, if he will do this when he's drunk, what will he not do when he's sober?"

Our author makes a quotation from a curious pamphlet by Boswell, published in 1780 :

"The Lords of Justiciary should not contract their travelling equipage into that of a couple of private gentlemen on a jaunt of pleasure, but should remember that it is the train of a court composed of different members. Formerly every one of the judges had his led horse — his sumpter, in the procession. The disuse of that piece of pageantry may be forgiven, though not applauded. But the abolishing of a covered wagon for the baggage of the circuit, though a paltry saving, is a great grievance. How shall the official clothes of the trumpeters; nay, how shall the record of the court, and the essential papers, be carried? Not to mention the gowns and clothes of others who ought to be decently dressed. Without it, there must be such shifts and such pinching as is to be found only in a

company of strolling players. Shall the mace, the badge of authority, be crammed into the boot of a coach, amongst black-ball, shoe-brushes, and curry-combs? The trumpeters be forced to ride in their official clothes, and look shabby? The embroidered G. R. upon the breast of their coats be turned out to the rain and the tempest as poor Lear was turned out by his own daughters? The record of the Court, the indictments, the criminal letters, precognitions, etc., must be at the mercy of the weather. The four pleas of the Crown may be blown about by the four winds of heaven."

"Another Edinburgh character, of a different sort, ceased in 1819 to be gazed at by men. This was Adam Rolland, advocate; sometimes said to have sat to Scott for his picture of Pleydell; a worthy, but fantastic personage. His professional practice had been very extensive, but only as a consulting and a writing counsel; for he never spoke, nor honored the public by doing anything in its presence. Divested of buckram, he was a learned and sound lawyer, and a good man, much respected by his few friends. But there are many men to whom the buckram is everything, and he was one of them. It was by his outside that he was known to the world. He was old at last; but his youth was marked by the same external absurdity that adhered to him through life, and I presume followed him into his coffin.

"His dresses, which were changed at least twice every day, were always of the same old beau cut; the vicissitudes of fashion being contemptible in the sight of a person who had made up his own mind as to the perfection of a gentleman's outward covering. The favorite hues were black and mulberry: the stuffs velvet, fine kerseymere, and satin. When all got up, no artificial rose could be brighter, or stiffer. He was like one of the creatures come to life again in a collection of dried butterflies. I think I see him. There he moves, a few yards backwards and forwards in front of his house in Queen-street; crisp in his mulberry-colored kerseymere coat, single-breasted; a waistcoat of the same, with large old-fashioned pockets; black satin breeches, with blue steel buttons; bright morocco shoes, with silver or blue steel buckles; white or quaker gray silk stockings; a copious frill and ruffles; a dark brown, gold-headed slim cane, or a slender green silk umbrella: everything pure and uncreased. The countenance befitted the garb; for the blue eyes were nearly motionless, and the cheeks, especially when slightly touched by vermilion, as clear and as ruddy as a wax doll's; and they were neatly flanked by two delicately pomatumed and powdered side curls, from behind which there flowed, or rather stuck out, a thin pigtail in a shining black ribbon. And there he moves, slowly and nicely, picking his steps as if a stain would kill him, and looking timidly, but somewhat slyly, from side to side, as if conscious that he was an object, and smiling in self-satisfaction. The whole figure and manner suggested the idea of a costly brittle toy, new out of its box. It trembled in company, and shuddered at the vicinity of a petticoat. But when well set, as I often saw him, with not above two or three old friends, he could be correctly merry, and had no objection whatever to a quiet bottle of good claret. But a stranger, or a word out of joint, made him dumb and wretched."

### Notices of New Publications.

**BRADFORD'S REPORTS.** Reports of Cases argued and determined in the Surrogate's Court of the County of New York. By ALEXANDER H. BRADFORD, LL. D., Surrogate. Vol. III. New York: John H. Voorhies. 1856.

Of the numerous courts throughout the United States, which have the important original jurisdiction of the probate of wills and settlement of estates of persons deceased, whether these courts be called by the name of Surrogate's, Register's or Probate, that of New York is the only one, so far as we are aware, whose decisions are reported. We are glad of the exception, for there are many interesting decisions given to us in the volume above cited and its predecessors. We will mention a few of those in the volume now before us.

*Vernam v. Spencer*, p. 16. A testator had caused a codicil to his will to be drawn up, and had requested the witnesses to attend its execution and attest it; after signing his name at the front, he died in the act of signing in the margin, the latter signature not being necessary by statute. It was held that the testamentary act was not complete, and could not be made so by the signing of the witnesses after the death of the testator, for the witnesses must sign under an existing request, which cannot continue after death.

*Leaycraft v. Simons*, p. 35. A father had made a will which especially favored his son, and wishing to change it, by enlarging his daughter's share, was prevented by the neglect of his son to comply with his request, to bring him the will. Held, that the will must be pronounced for.

*Taylor v. Taylor*, p. 51. Contracts outstanding at the testator's death, for the improvement of real estate by the erection of tenements, are a charge on the personal estate.

*Vaughan v. Burford*, p. 78. The will was thus: "New York, September 15, 1851. John Burford has \$230 in the Manhattan Savings Bank, Broadway. I do bequeath \$230 to Sarah Burford at my death." This paper was drawn up at the decedent's request, in a separate room, and signed by the witnesses, then read aloud to the decedent in the presence of the witnesses and including their names, it was then signed by the decedent. Held, a valid execution. (The Statute of New York does not require the witnesses to rise in the testator's presence.)

*McPherson v. Clark*, p. 92. A testator after executing his will, wished to revoke certain gifts to a daughter, and struck his pen through the clause relating to her, he also changed the residuary clause by striking out "my children" and substituting "my two sons." The will was not republished. Held, that although the gift to the daughter might be revoked by striking out the clauses containing them, yet a devise over could not be made, without re-execution of the will, and, therefore, the entire intent not being properly carried out, the whole failed and the devise to the daughter must stand. In the important and elaborate judgment in *Hunt v. Martine*, p. 322, the learned Surrogate decides a question which appears to be new in our jurisprudence. His opinion is that a will, made according to the forms established in the law of the testator's domicile, is valid, as a will of personalty, although the testator should afterwards

change his domicile to a place where different forms are required, and should there die, having executed no disposition according to these latter forms. This opinion agrees with those of the most distinguished foreign jurists, who are better authority upon the conflict of laws than the English judges, and we have no doubt of its correctness. We commend the case itself to the perusal of our readers.

There are many other interesting cases reported in this volume, and the more interesting, from the circumstance that the Surrogate being judge of fact as well as law, in the cases brought before him. We have a much fuller statement of facts than is found in the works of the common law, and facts, too, touching the most important of human relations. It is well known that the reports of the admiralty and consistory courts are, for this reason, the pleasantest law reading in the world. But we have not space to notice those cases further.

In conclusion, we feel bound to say that while the decisions of the learned Surrogate are very well reasoned, learned and able, they are occasionally injured in the reading by an occasional inaccuracy of style, which to those who believe, with us, that sound thoughts in sound language is an essential motto for authors, even of law books, is painful. In the artistic part of the book, if we may so call it, there is a want of care, which is more important. The cases do not begin with a condensed statement of the facts. This is very well when the opinion of the judge gives (as these do very fully as we have said) the circumstances, provided there be no report of arguments; but where the arguments of counsel are given, the true mode is to give the facts first, then the arguments, and to avoid repetition by condensing somewhat, if necessary, the opinion of the court. Our readers are well aware that we like to see the arguments of counsel reported, when able and learned, but we think the learned author has, in this volume, given counsel somewhat more room than is necessary, and with a little more labor, might have condensed some of their remarks. He has erred, however, on the safe side. On the whole, the book is very interesting and useful, and we hope the learned author will be encouraged to continue the series.

**MAINE REPORTS. Vol. 38. (HEATH. Vol. 3.)**

This is a more interesting volume of the Maine Reports than any of the series that we remember to have examined for some time past. In fact, Maine law (excepting her famous liquor law) has been rather at a discount for several years. As compared with the days when Mr. Greenleaf left off reporting, or even so lately as when Mr. Appleton, now of the Supreme bench, filled the office of reporter, we think there can be no doubt that the later decisions of the Supreme Court of that State have declined in weight and authority with the profession. Whether this is largely owing to the fault of the reporters in sordding before the profession unimportant matter, with unnecessary prolixity, — which we will not undertake to say, because we suppose they are bound to publish every case argued and decided, whether good, bad, or indifferent, — or to the lack of ability and industry on the part of the judges, — which also we cannot affirm, considering the extent and variety of their duties, and the well-earned reputation which some of them have enjoyed, — or to what other cause or combination of causes, we leave to those better informed to decide.

The present volume, we are glad to say, revives some of our old interest in the Maine cases. Not perhaps so much from any improvement in the

style of reporting, as we may take occasion hereafter somewhat to illustrate, as from the springing up of interesting matter of decision, and from awakened ambition, as we fancy, on the part of some if not all the members of the bench to give emphasis and significance to their opinions.

We think our readers will be obliged to us for a hasty notice of some of the points which have of late been agitated in that jurisdiction.

*Williams v. Morton*, p. 47, is to the point, that a guardian's sale of real estate under license from the Probate Court, will convey no title, if there is an omission of the guardian to furnish the statute bond. The case is an affirmance of *Williams v. Reed*, 5 Pick. 480, and is worthy the attention of all Massachusetts practitioners, perhaps of those in nearly all the other New England States.

*Parsons v. Huff*, p. 137, is a somewhat sharp decision on rejecting a deposition, where the certificate of the magistrate set forth that the deponent *before* testifying was sworn "to testify the truth, the whole truth, and nothing but the truth;" without adding, in the words of the statute, "relating to the cause or matter for which the deposition is taken;" and where this defect was held not to be remedied, by the magistrate, adding that "*after* giving the afore-said deposition he was *duly sworn according to law*." Mr. Justice Appleton, in giving the opinion of the court, very clearly and forcibly points out that the safeguard of the law of perjury does not apply to an informal oath, and that the statute requisition of an oath *before* commencing the deposition, cannot be satisfied by a re-administration of an oath with proper formalities *after* the deposition is completed. The case is precisely in point to Massachusetts practice; the words of the Maine statute being substantially the same with those of the Revised Statutes of Massachusetts, ch. 94, § 20. We apprehend that our own court, however, would not have come up to the same degree of strictness.

*Bucknam v. Thompson*, p. 171, contains an important construction of the exception in the Statute of Limitations, now very generally prevailing in the legislation of the Northern States, regarding absence from the State not making up a part of the statute prescription. Thus the language, "if after any cause of action shall have accrued, the person against whom it shall have accrued, shall be absent from and reside without the State," means such a residence as amounts to an *established residence or home*.

In *State v. Lighthody*, p. 200, an indictment was quashed after a prisoner was arraigned, on objection that the *venire* for the grand jury was not under seal. We presume that all the indictments of the term fell with it.

In *State v. Toggart*, p. 298, the court hold that the signature of the foreman of the grand jury by the initials only of his Christian name is sufficient. The case deserves noting under Mr. Heard's full and valuable note to *State v. Freeman*, 13 N. H. 488, 1 Bennett & Heard's Leading Criminal Cases, p. 204. The Attorney-General (Hon. George Evans), and the Court (Mr. Justice Appleton), have fallen into a curious mistake in this case, in citing from an imperfect report of the Webster trial. Webster's case was cited by the counsel for the government, as an authority that the foreman's name might as well be attached to an indictment in an abbreviated shape as in full: thus, "Dan'l Rhoades, foreman;" and Mr. Evans quotes Dr. Stone's pamphlet edition for authority. Both the Attorney-General and the Court seem to think the precedent one of considerable importance, because, as they say, "though the indictment in this case was contested by his (Professor Webster's) counsel on every point, no objection was taken that the foreman's name was abbreviated." Now, if the learned Court and Attorney-General will take pains to look at the

authentic report of the case (Bemis, p. 3), they will find that the real mode of signing was "Daniel Rhodes" in full.

To serve as a preventive to our readers against similar mistakes in citing the abovenamed "pamphlet," or (as it is more commonly called), "phonographic" report of the Webster case, we will take occasion to state that it comes so near amounting to a travesty of the whole matter, that one of Professor Webster's counsel, to our knowledge, offered the publishers, Messrs. Phillips & Sampson, a hundred dollars, merely to omit his speech altogether, so that he need not go before the public in such a shocking botch of mistakes and nonsense. The offer was rejected, on the score that the speech was then in type, and it would interfere with getting out the book, to make the corrections!

As a single other specimen of the report, and as an excellent legal joke, we will stop to quote Dr. Stone's report of Mr. Sohler's idea of manslaughter, p. 130. "If," (the combatants) "get excited on equal terms (!) and commence their quarrel with the fist and afterwards have some other weapon, it is excused as *caused by heat of blood excited by the body.*" "Heat of blood, excited by the body," for the heat of blood of manslaughter! Doubtless the Doctor's mind was just then running on violent exercise and a quickened circulation. But we are afraid that even a profuse perspiration would be a poor plea in the mouth of a homicide on trial for murder.

But, to resume: *Donahoe v. Richards*, p. 379, is the decision in regard to the use of the Bible as a reading book in the common schools, which attracted so much attention at the time of its announcement, on account of its religious and political bearings. We published the opinion of the court in our last August number, as given by Appleton, J. It will well repay a second reading. The argument of the counsel for the plaintiff, the losing party, is given quite *in extenso*. Mr. Rowe certainly makes out a good deal of a case, at first blush, for Mr. Dana and the court to meet and overcome. As a specimen of reporting, Mr. Dana's argument, as here reported, if faithfully abbreviated, hardly does justice to the interesting and able plea which we read at the time in the newspapers. In looking for this case in the index, we could find no reference to it under the heads of School, Action, or Case. Some imperfect abstract is given under the head of Constitutional Provisions.

*Wentworth v. Poor*, p. 243, seems substantially opposed to the late Massachusetts case of *Thurber v. Martin*, 2 Gray, 394, where it was held that the constant use by a riparian proprietor of the waters of a running stream for a mill does not deprive a proprietor of an upper privilege from making a reasonable use of the same, "adapted and appropriate to the capacity of the stream," though necessarily interfering thereby to some extent with the lower proprietor. We rather think the Massachusetts court took the more liberal view of the subject; though neither case is sufficiently developed on the facts to throw much light on the important principle involved.

*Nickerson v. Harriman*, p. 277, is an interesting case on the law of damages as to the speculative value of a minor's life to his father. It was held that if the minor died, the jury were not at liberty to conjecture what would have been the value of his services if living.

In *State v. Upham*, p. 261, it is held (much to our surprise that it needed holding, or that there were adjudications already existing on the point), that if a criminal offers no evidence of good character the prosecutor is not at liberty to raise an inference in argument to the jury, of the defendant's guilt or of his bad character. It seems that there had been an unlucky decision of the court (*State v. McAlister*, 24 Maine, 139) to the

contrary; and that doubtless brought the point up for revision. We do not find that Mr. Heath, in his list of "cases doubted or overruled," makes any mention of this; and yet we understand its authority to be flatly denied; as it ought to be.

In *Freeman v. Machias Water Power and Mill Company*, p. 343, affirming *Miller v. Ewer*, 27 Maine, 509, the important point in corporation law is held, that no legal organization by corporators under a charter granted in Maine can be effected by their action in another State.

But we forbear further citations. We hope that these are sufficient to show to Massachusetts practitioners, at least, that the jurisprudence of our sister State continues to be of value and importance to them. Thirty-eight volumes of construction of Massachusetts law now to be availed of from the District of Maine alone, where, since Chief-Justice Shaw came to the bar, not a volume of printed reports of either State could be laid hold of for the practitioner's guide!

Of Mr. Heath's style of reporting, as before intimated, we cannot pass our unqualified expression of approbation. We are not fond of marginal notes like "when a deed is void as to creditors," "of allowing an officer to amend his return," "of the construction of a deed;"—all in the same case too, *Wellington v. Fuller*, p. 61. To say that very many cases contain the same kind of abstracting is enough to show want of care, though it may be countenanced by Howard and Peters, of the highest court in the Union.

GREENLEAF'S EVIDENCE. Vol. III. 3d Edition. Boston: Little, Brown & Co.

This edition of Mr. Greenleaf's last volume of his standard work on evidence has been improved by the annotations of F. F. Heard, Esq., on the division of Criminal Law. Mr. Heard's position for doing justice to the task is a highly favorable one. Fresh as he is from the compilation of the volume of "Leading Criminal Cases," in connection with Mr. Bennett, and the preparation of "Precedents of Indictments," in conjunction with Mr. Train, and from his own separate editing of "Davis's Criminal Justice," he adds to a knowledge of the newest law a strong interest in all the debatable and doubtful points of his province, and a true professional ardor in endeavoring to clear them up. We believe that it is at the hands of just such an editor that Mr. Greenleaf's book is capable of being improved. Sometimes the practitioner, we fancy, is apt to suspect that he is not sure to find the newest case referred to in the professor's text and notes, and regrets that the citation of cases, from which he can seek out and establish his particular point of doctrine, is not more copious. This kind of deficiency he will find supplied at Mr. Heard's hands. Mr. Greenleaf's commentary, as is well known, has not the fulness of Roscoe; but the profession will be obliged to Mr. Heard for so far bridging over the interval.

COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE. By Joel Prentiss Bishop. 3d Edition. Boston: Little, Brown & Co. 1856.

When this work first appeared we devoted an article to some topics suggested by it, and to a review of the book itself. We see no cause to retract or qualify the good opinion then expressed. The book is marked by the excellencies of great industry in the collection and method in the

arrangement and analysis of the authorities, and what more can we ask of legal text-books at this day? We are glad to see that the learned author has been obliged so early to prepare a new edition, and that it is enriched by numerous citations from the Scotch law, which is peculiarly valuable in this branch of jurisprudence, but which was inaccessible to the author when his work was first written.

**Insolvents in Massachusetts.**

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, George	Amesbury,	June 25 1856.	John G. King.
Adams, William (a)	Amesbury,	" 20,	John G. King.
Allman, Thomas, jr.	Boston,	" 20,	Isaac Ames.
Ayer, Daniel	Lowell,	" 9,	Isaac Ames.
Badger, John C.	Boston,	" 28,	Isaac Ames.
Balcom, Sumner W. (b)	Worcester,	" 18,	Alexander H. Bullock.
Baldwin, Eden A. (c)	Worcester,	" 22,	Alexander H. Bullock.
Blood, Nathaniel	Chelmsford,	" 23,	L. J. Fletcher.
Bowen, Daniel W.	Boston,	" 17,	Isaac Ames.
Breed, Theophilus N.	Lynn,	" 17,	John G. King.
Burk, Joseph	Boston,	" 27,	Isaac Ames.
Burnham, Mary	Essex,	" 12,	John G. King.
Castell, Edward	Boston,	" 24,	Isaac Ames.
Chase, Increase S.	West Newbury,	July 5,	John G. King.
Colby, Amos	Amesbury,	June 30,	John G. King.
Cook, Henry A.	Malden,	" 13,	John W. Bacon.
Damon, James G.	North Reading,	" 10,	John W. Bacon.
Damon, Solomon B.	Goshen,	" 17,	H. H. Chilson.
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**ERRATUM.** In the July number, p. 155, line 1, for *genuine power* read *general power*.

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